82-1608

No. 82-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Petitioner,

Esther Wunnicke v.

~~ROBERT LERESCHE~~, COMMISSIONER OF DEPARTMENT OF NATURAL RESOURCES OF THE STATE OF ALASKA, *et al.*,
Respondents,

KENAI LUMBER CO., INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Can a State, without the express consent of Congress, prohibit private parties from exporting into interstate and foreign commerce unprocessed logs obtained from State-owned land, when both the stated purpose and the effect of the prohibition are to favor local manufacturing interests?

2. Can Congressional consent to an otherwise unconstitutional State restraint on interstate and foreign commerce be implied from federal statutes or administrative rules solely regulating activities on federally-owned lands?

PARTIES INVOLVED

Petitioner, South-Central Timber Development, Inc., has two subsidiaries, South Central Export Sales Co. and Western Alaska Logging Co., Inc., and no affiliates. When this suit was filed, petitioner was a wholly-owned subsidiary of Iwakura-Gumi Lumber Co., Ltd., a Japanese corporation. On or about February 17, 1983, Far North Supply Corporation, a Washington corporation, purchased all the shares of South-Central Timber Development, Inc., and now operates South-Central as a wholly-owned subsidiary. Far North Supply Corporation has no other affiliates or subsidiaries.

Respondents, Robert LeResche, Commissioner of the Department of Natural Resources of the State of Alaska, Geoffrey Haynes, Director of the Division of Lands of the Department of Natural Resources, and Theodore G. Smith, Director of Forest, Land and Water Management, of the Department of Natural Resources, were appellants below and defendants in the district court. Respondent, Kenai Lumber Company, Inc., a subsidiary of Louisiana Pacific Corporation, was an appellant below and an intervenor-defendant in the district court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, South-Central Timber Development, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 1, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 693 F.2d 890, and is set forth in Appendix A, *infra*, pp. 1a-7a. The memorandum and order of the United States District Court for the District of Alaska is reported at 511 F. Supp. 139, and appears in Appendix B, *infra*, pp. 8a-16a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1982. On February 17, 1983, Justice Rehnquist extended the time within which to file a petition for writ of certiorari to and including March 30, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE, AND REGULATIONS INVOLVED

This case involves the following constitutional provision, statute, and regulations: the Commerce Clause of U.S. Const. art. I, § 8, cl. 3; Alaska Stat. § 38.05.115; Alaska Admin. Code tit. 11, § 76.130 (1974) (repealed 1982); Alaska Admin. Code tit. 11, § 71.230 (1982); and Alaska Admin. Code tit. 11, § 71.910(11) (1982). These provisions are set forth in Appendix D, *infra*, at 19a-21a.

STATEMENT

This case involves an attempt by the Commissioner of the Department of Natural Resources of the State of Alaska to require that certain timber cut from state-owned lands be processed in-state prior to being exported into foreign or interstate commerce. The court of appeals concluded that this state restraint did not violate the Commerce Clause because the court found "*implicit approval* of the Alaska statute under congressional statutes which impose similar conditions on the sale of timber from *federal* lands." (693 F.2d at 891; App. A at 2a) (emphasis added). This decision raises two important Commerce Clause issues. *First*, whether a court can redefine federal/state power to regulate interstate and foreign commerce when it finds that Congress has given implicit, rather than express, consent to state action that would otherwise violate the Commerce Clause. *Second*,

whether a state can condition the sale of state-owned natural resources on the purchaser's promise to process the natural resources in-state, when both the purpose and the effect of the state restraint are to protect local manufacturing interests.

Petitioner, South-Central Timber Development, Inc., an Alaska corporation, is engaged in the business of purchasing Alaska standing timber,[1] logging such timber, and shipping the resulting logs into foreign commerce.[2] In 1980, the Petitioner filed a Complaint For Injunctive Relief in the United States District Court for the District of Alaska, alleging that Robert LeResche, Commissioner of the Department of Natural Resources of the State of Alaska, and others, were preparing to hold a state timber

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[1] "Timber" means trees in their natural condition and location, live or dead from natural causes; "logs" means portions of trees cut into lengths, with limbs removed, transported off the land where they grew and ready for manufacture into lumber, plywood, paper or other usable products; "cants" are portions of logs which have been cut lengthwise and thus are flat on at least one side, but which will have to be cut lengthwise again to produce lumber suitable for end use.

[2] Exports account for 93% of the sales of wood products produced from Alaska timber, and virtually all such exports are destined for Japan. *See* Kerr & Wibbenmeyer, *Alaskan Export Policy* 26, 33 (1979). Due to shipping costs, there is neither an interstate market for Alaska wood products nor any market at all for "squares" or "cants" manufactured to Alaska specifications. Thus, the principal burden of Alaska's primary manufacture requirement falls on export trade with Japan. Japan is also the major international purchaser of unprocessed logs from other states located in the Ninth Circuit. In fact, in 1980, Japan purchased 90% of the $1.4 billion of unprocessed logs exported from Washington, Oregon, Alaska, and California. F. Ruderman, *Production, Prices, Employment and Trade in Northwest Forest Industries, Second Quarter 1982* at 19 (U.S. Forest Service 1982).

sale, and that the public notice and state contract contained certain provisions and regulations which were repugnant to the Commerce Clause of the United States Constitution. (U.S. Const. art. I, § 8, cl. 3.)

Specifically, the contract imposed a "primary manufacture" requirement, *i.e.*, the timber would have to be processed in-state prior to export. The Commissioner's action was taken pursuant to state regulations in effect at that time. *See* Alaska Admin. Code tit. 11, § 76.130 (1974) (repealed 1982). (App. D at 20a-21a.)[3] The stated purpose of the requirement was to protect in-state manufacturers. In particular, the State legislature passed resolutions requesting that the Commissioner of the Department of Natural Resources exercise his statutory authority to impose the primary manufacture requirement in order "to provide local employment as well as building materials for the Alaska market." (Excerpt of Record in the Court of Appeals at 73.) In addition, "[t]he Commissioner stated the requirement was necessary to insure 'a continuing supply of timber for existing industry' during temporary shortages of timber from federal lands. Final Finding for Icy Bay/Cape Yakatuga Sale at 2 (Excerpt of Record (E.R.) 121, 122)." (693 F.2d at 892; App. A at 3a-4a.)

Petitioner was operating in the same area under an earlier state timber sale which did not require local pro-

[3] While the original primary manufacture regulation has been repealed, it has been replaced by two other provisions which, in effect, reenacted the policy of the State or arguably even strengthened that policy. *See* Alaska Admin. Code tit. 11, § 71.230 (1982) and Alaska Admin. Code tit. 11, § 71.910(11) (1982). (App. D. at 19a-20a.) Recently, the State of Alaska advertised six timber sales in the south central district of Alaska which were to be held on March 1, 1983. All six sales were to require primary manufacture within Alaska.

cessing, and exporting most of the logs to Japan. Petitioner does not have a working mill in Alaska, and, therefore, would have been unable to meet the local processing requirement. Thus, because of the additional costs of having the primary manufacture performed in-state,[4] petitioner was effectively precluded from bidding on the timber. (511 F. Supp. at 141; App. B at 10a.)

1. District Court Decision

On January 5, 1981, the United States District Court for the District of Alaska issued a Memorandum and Order granting the Petitioner's Motion for Summary Judgment and a Permanent Injunction. (511 F. Supp. at 139; App. B at 8a.) The Court found it had jurisdiction pursuant to 28 U.S.C. § 1331(a), the amount in controversy exceeded $10,000, and the State regulations violated the U.S. Const. art. I, § 8, cl. 3. (511 F. Supp. at 140; App. B at 9a.) The Judgment granting a Permanent Injunction prohibiting the Defendants from requiring primary manufacture under the State regulations was entered by the District Court on January 6, 1981. (App. C at 17a-18a.)

The district court rejected the State's argument that the primary manufacture requirement was permissible under the Commerce Clause because the requirement was consistent with federal policy. After examining federal statutes and regulations restricting the export of

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[4] The timber at issue is in a remote location, and the only available site to process it is a mill owned by Kenai Lumber Company, the intervenor in this case. Kenai Lumber Company was a competing bidder on the particular tract of timber involved in this case. (693 F.2d at 892; App. A at 4a.)

unprocessed logs from *federal* lands, the court concluded that

> Congress has not consented to any primary manufacture requirements imposed *by the states*. . .
>
> * * *
>
> Although Congress has authorized the Secretary of Agriculture to make necessary rules to regulate the national forests, and has imposed export quotas on unprocessed timber from *federal* lands, *it has in no way expressly exempted state timber laws from commerce clause restrictions.*

(511 F. Supp. at 141-42; App. B at 12a) (emphasis added).

The district court also rejected the State's argument that the challenged action was exempt from Commerce Clause scrutiny because the State was acting in a proprietary capacity. The court, rejecting the State's reliance on *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976) and *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), considered the uniqueness of the natural resource involved, the fortuity of its location, and the national need for the unrestricted flow of timber and concluded that Alaska could not discriminate in favor of local businesses "simply because a resource lies on state-owned land." (511 F. Supp. at 143; App. B at 14a.) The court concluded: "While the fact that a state owns a natural resource may allow it to favor its residents in the distribution of the resource in certain ways, a state may not 'attach conditions to the use or disposition of the resource that might independently burden interstate commerce. . . .' " (511 F. Supp. at 143; App. B at 14a) (quoting Hellerstein, *Hughes* v. *Oklahoma: The Court, The Commerce Clause, And State Control Of Natural Resources*, 1979 Sup. Ct.Rev. 51, 79 (1980)).

On the merits of the Commerce Clause issue, the court held that the primary manufacture requirement was unconstitutional. The court found that the in-state processing requirement constituted simple economic protectionism, that the requirement placed a substantial burden on interstate commerce, and that the State had less burdensome means available to achieve the same end. (511 F. Supp. at 143-44; App. B at 15a-16a.)

2. Court Of Appeals Decision

On appeal, the Ninth Circuit reversed. (693 F.2d at 890-93; App. A at 1a-7a.) The court of appeals noted that the Commerce Clause, by its own power, invalidates state statutes that discriminate against or unduly burden interstate commerce, and that in the absence of congressional authorization, "state statutes which discriminate against interstate commerce for the purpose of local, economic protection are invalid in virtually every case." (693 F.2d at 892; App. A at 4a.) The court of appeals also recognized that this Court has carved out narrow exceptions to this general rule, e.g., when a state acts as a "market participant," and not as a "market regulator," the Commerce Clause does not apply. The court of appeals concluded, however, that it did not have to consider whether the "market participant" exception applied, since this was not a case where "the courts must apply the commerce clause absent a declaration by Congress respecting the economic regulation at issue. Here, Congress has acted to validate the state policy." (693 F.2d at 892; App. A at 5a.)

The Ninth Circuit recognized that "usually" regulation of interstate or foreign commerce by a state that would otherwise violate the Commerce Clause requires that Congress *expressly* authorize the state regulation. (693 F.2d at 893; App. A at 5a.) The Ninth Circuit, however,

found, *without citing any authority*, that such direct and express approval of Congress is not always required and that "[t]here will be instances, like the case before us, where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests." (693 F.2d at 893; App. A at 5a.)

The Ninth Circuit then found that "there is *implicit approval* of the Alaska statute under congressional statutes which impose similar conditions on the sale of timber from federal lands." (693 F.2d at 891; App. A at 2a) (emphasis added). In particular, the court of appeals found that the federal policy with respect to timber cut from federal lands "evinc[ed] a general federal policy of promoting geographic dispersion in the timber industry" (693 F.2d at 893; App. A at 5a), and that the Alaska State policy served the same objective as the federal policy, *i.e.*, "that of promoting industrial developments in isolated areas." (693 F.2d at 893; App. A at 6a.) Because, according to the court, "[t]he state's decision could not have been more in keeping with federal timber policy," it concluded that there was "ample congressional acquiescence in Alaska's primary manufacture requirement." (693 F.2d at 893; App. A at 6a.)

REASONS FOR GRANTING THE WRIT

The decision below sanctions a state restraint on interstate and foreign commerce that was intended solely to protect local manufacturing interests. The court of appeals reached this result by concluding that Congress had given its "implicit approval" to the state practice. This "implicit approval" theory is unprecedented; it is inconsistent with both prior decisions of this Court and the theory underlying the Congressional consent doctrine. Moreover, this "implicit approval" theory will en-

courage other resource-rich states to imitate Alaska by enacting discriminatory legislation of their own. Finally, this "implicit approval" theory introduces an unnecessarily complex and indeterminate inquiry into Commerce Clause litigation. Review by this Court is needed to clarify the scope of the Congressional consent doctrine, to avoid the enactment of similar state discriminatory legislation, and to prevent state protectionist measures from interfering with foreign commerce.

I. The Ninth Circuit's "Implicit Approval" Theory Is In Conflict With Prior Decisions Of This Court Requiring Express Congressional Consent To State Action That Would Otherwise Violate The Commerce Clause.

It is well-established that "Congress has undoubted power to redefine the distribution of power over interstate commerce . . ." by consenting to state action that would otherwise violate the Commerce Clause. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945). When this Court has

> found such consent, [however,] Congress' " 'intent and policy,' to sustain state legislation from attack under the Commerce Clause" was " 'expressly stated.' " *New England Power Co.* v. *New Hampshire*, . . . (quoting *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427 . . . (1946)).

Sporhase v. *Nebraska ex rel. Douglas*, 102 S. Ct. 3456, 3466 (1982) (footnote omitted); *see Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980).

The decision below holding that Congressional consent can be implied is in direct conflict with an unbroken line of decisions of this Court. Just four weeks ago, this Court stated: "Where state or local government action is *specifically authorized by Congress*, it is not subject to the Commerce Clause even if it interferes with interstate

commerce." *White* v. *Massachusetts Council of Construction Employers, Inc.*, 51 U.S.L.W. 4211, 4213 (U.S. Feb. 28, 1983) (emphasis added). In *White*, this Court rejected a Commerce Clause attack on a local restraint on commerce because this Court found that "the federal regulations . . . *affirmatively permit* the type of parochial favoritism" involved. *Id.* at 4213-14 (emphasis added) (footnote omitted). "But when Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427, 431 (1946), [this Court has] no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.' " *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982) (citation omitted); *see Western & Southern Life Insurance Co.* v. *State Board of Equalization of California*, 451 U.S. 648 (1981); *H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525 (1949).

There are important reasons for requiring that Congressional consent be stated expressly. Commerce Clause issues involve the allocation of power between the federal government and the states. This Court's Commerce Clause precedents ensure that a delicate accomodation between federal and state interests is maintained. Although the Constitution recognizes that the states retain a significant degree of autonomy, the Commerce Clause ensures that state "tendencies toward economic Balkanization," *Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979), do not threaten national unity. Any departure from these settled principles, *i.e.*, any redefinition of this allocation of power, is a serious matter. This Court's precedents have, therefore, consistently required that Congress expressly reveal its intent to redefine the federal/state relationship, and have firmly established that such redefinition will not be presumed in the

absence of explicit Congressional authorization. It is this longstanding and important principle that the Ninth Circuit has seriously undermined.

Underlying this principle is the basic concern that those harmed by a governmental act be represented in the political body making the decision. This Court has been particularly hostile to economic protectionism, in part, because the parties adversely affected, viz., out-of-staters, are not represented in the political body enacting the discriminatory legislation. *See South Carolina State Highway Department* v. *Barnwell Brothers*, 303 U.S. 177, 184 n.2 (1938); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 45 n.2 (1940); *see also* Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 Wis. L. Rev. 125, 128 n.14. It is permissible for Congress to consent to such discriminatory legislation because those adversely affected are represented in the political body deciding that the discriminatory legislation is in the national interest. *See McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 435-36 (1819); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954). "[T]he dangers of a part discriminating against the whole are greater than the whole discriminating against a part, for an inner political check that is not operative in the former is operative in the latter case." J. Nowak, R. Rotunda and J. Young, *Constitutional Law* 245 (1978). Only when Congressional consent is explicit can we have any confidence that those adversely affected have had an opportunity to participate in the governmental decision that has done them harm.[5]

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[5] This concern may be even more important where the discrimination is against foreign countries or nationals since their only political recourse is through the diplomatic process, and foreign diplomats are accredited only to the federal government. See generally *infra* at 16-19.

Moreover, local economic protectionism is a continuing problem. *See, e.g., Hughes* v. *Oklahoma*, 441 U.S. 322 (1979). The Ninth Circuit's open-ended "implied authorization" test will only invite more discriminatory legislation. The states have attempted to use the "implied consent" argument in the recent past, without success. *See, e.g., Sporhase* v. *Nebraska ex rel. Douglas*, 102 S. Ct. 3456 (1982); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331 (1982); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980). The Ninth Circuit's innovation will only encourage more attempts at local protectionism. The Oregon experience (discussed *infra* at 15) is only a beginning.

In addition, an implied consent doctrine would be extremely difficult to apply. As stated by the Ninth Circuit—without citation of authority and with virtually no explanation of the underlying rationale—the doctrine introduces an unnecessarily complex and uncertain inquiry into Commerce Clause litigation.

In short, the Ninth Circuit's adoption of an "implicit approval" theory raises an important Commerce Clause issue which should be considered by this Court. The "theory" is inconsistent with prior decisions of this Court; it is flatly inconsistent with the theory underlying Congressional consent; it will encourage other resource-rich states to enact similar discriminatory measures; and it will unnecessarily complicate Commerce Clause litigation.

II. Requiring In-State Processing Of Natural Resources Is Contrary To Commerce Clause Precedents And Is Of Great Practical Importance.

This Court has long recognized that the battle over the control and exploitation of the nation's natural resources threatens fundamental Commerce Clause concerns, *see*,

e.g., *Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923); *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911), and the recent histories of both the United States and Canada have aptly illustrated that recognizing the power of local political units to reserve natural resources found within their borders for the benefits of their inhabitants carries a serious potential for the division of the nation along local or regional lines.[6]

Furthermore, in Commerce Clause cases, this

> Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal. *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1; *Johnson* v. *Haydel*, 278 U.S. 16; *Toomer* v. *Witsell*, 334 U.S. 385.

Pike v. *Bruce Church, Inc.*, 397 U.S. 137, 145 (1970). Because such restraints "impose an artificial rigidity on the economic pattern of the industry . . ." *Toomer* v. *Witsell*, 334 U.S. 385, 404 (1948)—a rigidity drawn along state lines—they threaten the animating purpose of the Commerce Clause, *i.e.*, to fuse a collection of independent, sovereign states into one nation. In short, the result of the decision below is to sanction the type of economic protectionism that goes to the heart of basic Commerce Clause concerns.[7]

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[6] *See, e.g., The Second War between the States*, Business Week 92-114 (May 17, 1976); *Balkanizing Canada: The Cost of Provincial Barriers*, Business Week 52 (Sept. 15, 1980).

[7] As the district court concluded, Alaska's ownership of the timber does not justify imposing an in-state processing requirement. (511 F. Supp. at 142-43; App. B at 13a-14a.) It specifically rejected Alaska's

In addition, the decision below has great practical impact on the timber industry in the western States. The timber industry already faces statutes restricting the export of unprocessed logs in four western states and the threat of legislation in others. Currently, both Idaho and Alaska impose primary manufacture requirements on both interstate and foreign exports; Oregon and California impose primary manufacture requirements on foreign exports only. Idaho Code § 58-403 (1905) (Amended, 1921, 1935, and 1974); Alaska Admin. Code tit. 11, §§ 76.130 (1974) (repealed 1982), 71.230 (1982) and 71.910 (1982); Or. Rev. Stat. § 526.805; Cal. Pub. Res. Code § 4650.1 (West Supp. 1982). (App. D at 19a-21a; App. E at 36a-38a.) *See also* Lindel, *Log Export Restrictions of the*

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argument that it was only acting as a "market participant," and not as a "market regulator," *see White* v. *Massachusetts Council of Construction Employers, Inc.*, 51 U.S.L.W. 4211 (U.S. Feb. 28, 1983); *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980); *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976). The court of appeals stated that "[w]e need not reach the question, however." (693 F.2d at 892; App. A at 5a.)

Although this Court has not identified precise limits to the "market participant" doctrine, the state action involved here is clearly outside the exemption from Commerce Clause scrutiny provided by that doctrine. *See, e.g.*, Hellerstein, *Hughes* v. *Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 Sup. Ct. Rev. 51, 79; Anson & Schenkkan, *Federalism, The Dormant Commerce Clause, and State-Owned Resources*, 59 Tex. L. Rev. 71, 92 (1980); Note, *The Commerce Clause and Federalism: Implications for State Control of Natural Resources*, 50 Geo. Wash. L. Rev. 601, 620 (1982). This case involves a state attempt to attach conditions to the use or disposition of state-owned natural resources beyond the state's *initial sale*. In fact, in *Reeves*, this Court specifically noted that South Dakota had not "cut off access to its cement altogether, for the policy [of preferring South Dakota customers] does not bar *resale* of South Dakota cement to out-of-state purchasers." 447 U.S. at 444 n.17 (emphasis added).

Western States and British Columbia 7 (U.S. Dept. of Agriculture 1978). As a result of the decision below, such protectionist measures may well be considered immune from Commerce Clause attack as the experience in Oregon clearly shows.

The Oregon statute and regulation have been questioned on Commerce Clause grounds by the Oregon Attorney General since 1961. (App. F at 39a-50a.) Since the decision below, the Oregon export ban has been effectively reinstated. A staff report published on January 6, 1983 by the Joint Legislative Committee on Trade and Economic Development of the Oregon legislature has, however, expressed concern and confusion over the Ninth Circuit's decision. The report pointed out that the doctrine of "implicit congressional approval" has never been enunciated by this Court, and suggested that a court could have as easily found that Congress has repeatedly decided *not* to restrict the export of logs from timber on non-federally owned lands as it could the "implicit" extension of the ban of exports from federal lands. *Final Draft, The Log Export Issue: An Analysis* (Jan. 6, 1983). (App. I at 62a-83a.) In short, the Ninth Circuit's decision further confuses state regulation of the vast timber resources found within the Ninth Circuit states. *See* U.S. Department of Commerce, *Statistical Abstract of the United States*, §§ 25, 26, 27, and Tables 1257, 1279, and 1308 (102d ed. 1981). (App. H at 52a-61a.)[8]

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[8] The western states within the Ninth Circuit's jurisdiction account for more than 57 percent of the total saw timber net volume for the entire United States and more than 71 percent of the softwood saw timber net volume for the entire United States. Thus any state regulation of the interstate or international commerce involving the timber they produce is of substantial national and international importance. As the *Statistical Abstract* also shows, the western states

Moreover, the impact of the decision below is not limited to the timber industry. If the Ninth Circuit opinion is allowed to stand without review, then the case may cause considerable confusion as to the permissibility of requiring in-state processing of any natural resource. The Federal Government has enacted many policies regarding oil, minerals, and other natural resources on federal land, *see generally, e.g.*, Pring, *"Power to Spare": Conditioning Federal Resource Leases to Protect Social, Economic, and Environmental Values*, 14 Nat. Resources Law. 305 (1981), and resource-rich states have already imposed restrictions on exporting other natural resources, including crude oil and natural gas in Louisiana and Texas. *See generally* Anson and Schenkkan, *Federalism, The Dormant Commerce Clause, and State-Owned Resources*, 59 Tex. L. Rev. 71, 93-95 (1980). The decision below will only encourage states to enact similar discriminatory legislation with respect to other natural resources under the theory that local protectionism is somehow consistent with federal policy with respect to natural resources.

III. The State Restriction Here Directly Burdens Foreign Commerce And Thus Interferes With A Sensitive Federal Function.

The primary impact of Alaska's restraint falls on international commerce, since most of the timber harvested in Alaska is exported—principally to Japan.[9] Petitioner has been frustrated by the State of Alaska in its attempt to

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which are within the Ninth Circuit's jurisdiction are also the repositories of other significant natural resources (including fish and minerals) which will, in all likelihood, become more important and significant as time progresses.

[9] *See* n.2, *supra*.

purchase unprocessed logs for export to Japan. Thus, without the express consent of Congress, a state restraint designed solely to protect local manufacturing interests has directly interfered with foreign commerce.[10]

This Court has long recognized that Congress has "exclusive and absolute" power over foreign commerce, *see Buttfield* v. *Stranahan*, 192 U.S. 470, 492-93 (1904), and that Commerce Clause scrutiny may be even more rigorous when a state restraint on foreign commerce is asserted than when only interstate commerce is involved. *See Bowman* v. *Chicago & Northwestern Railway Co.*, 125 U.S. 465, 482 (1888). Indeed, it was only a short time ago that this Court strongly emphasized the enduring vitality of these principles in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448-49 (1979) (footnotes omitted) (citation omitted):

> Foreign commerce is preeminently a matter of national concern. "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Board of Trustees* v. *United States*, 289 U.S. 48, 59 (1933). Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce "with foreign Nations" and "among the several States" in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater. Cases of this Court, stressing the need for uniformity in treating with other nations, echo this distinction. . . . Finally, in discussing the Import-Export Clause, this Court, in *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285 (1976), spoke of the Framers' overriding concern that "the Federal

[10] As noted above, Oregon and California have primary manufacture requirements which are limited to international exports.

> Government must speak with one voice when regulating commercial relations with foreign governments." The need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to "regulate Commerce with foreign Nations" under the Commerce Clause.

In short, "[i]f state action touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any significant degree, a far more difficult task than in the case of interstate commerce." L. Tribe, *American Constitutional Law* § 6-20, at 380 (1978).

Congress has explicitly recognized that export restrictions have potentially serious implications for international relations; that "the ability of United States citizens to engage in international commerce is a fundamental concern of United States policy," and that "[u]ncertainty of export control policy can curtail the efforts of American business to the detriment of the overall attempt to improve the trade balance of the United States." Export Administration Act of 1979, 50 U.S.C. app. § 2401 (1), (2) and (6) (Supp. III 1979). Thus "[i]t is the policy of the United States to minimize uncertainties in export control policy and to encourage trade with all countries with which the United States has diplomatic or trading relations. . . ." Export Administration Act of 1979, 50 U.S.C. app. § 2402(1) (Supp. III 1979). (App. E at 24a.)

Congressionally-imposed export restrictions are therefore generally limited to situations where export controls are deemed necessary to serve national security purposes (50 U.S.C. app. § 2404), to further foreign policy objectives (50 U.S.C. app. § 2405), or to retain for domestic use commodities determined to be in short supply. (50 U.S.C. app. § 2406). Congress has accordingly been very specific in stating when it wants export controls to be imposed. One example of this is found in the controls imposed on

Alaska North Slope crude oil, which cannot be exported to foreign countries subject to some very limited exceptions. *See* Trans-Alaska Pipeline Authorization Act, 30 U.S.C. § 185(u) (1976); Export Administration Act of 1979, 50 U.S.C. app. § 2406(d) (Supp. III 1979). Another even more pertinent example is the export control imposed on unprocessed western red cedar logs from state and federal lands. Export Administration Act of 1979, 50 U.S.C. app. § 2406(i) (Supp. III 1979). (App. E at 28a-29a.) If Congress had intended to allow similar controls to be imposed on other types of unprocessed logs from state lands, it would have explicitly said so—which it has not.

In short, what the State of Alaska has sought to do here is to take over the sensitive Congressional function of balancing national and international interests, and to decide for itself to burden foreign commerce. This is impermissible. Congress knows how to regulate international exports and its regulation should be exclusive. Thus, the "implied consent" theory relied on by the court below is especially erroneous where restrictions on foreign commerce are at issue.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue. Indeed, so clear is the

error of the decision below that we believe summary reversal would be appropriate.

Respectfully submitted,

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March, 1983

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-3053X
81-3081X

D.C. No.
A80-311 Civ.

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff-Appellee,

v.

ROBERT LERESCHE, Commissioner of the Department of Natural Resources of the State of Alaska; *et al.*,
Defendants-Appellants,

KENAI LUMBER COMPANY, INC.,
Intervenor Defendant.

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff-Appellee,

v.

ROBERT LERESCHE, Commissioner of the Department of Natural Resources of the State of Alaska; *et al.*,
Defendants,

KENAI LUMBER COMPANY, INC.,
Intervenor
Defendant-Appellants.

FILED
December 1, 1982

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

OPINION

Appeal From The United States District Court
For The District Of Alaska

Honorable James A. von der Heydt, Chief Judge,
United States District Judge, Presiding

Argued and Submitted: December 10, 1981

Before: GOODWIN, KENNEDY, and SKOPIL, Circuit Judges.

KENNEDY, Circuit Judge:

The State of Alaska, by statute, authorizes the imposition of certain conditions on the sale of state-owned timber, conditions pointedly designed to favor its local timber processors. In an action brought by a prospective timber buyer challenging the constitutionality of the state's restrictions, the district court held the Alaska statute violates the commerce clause of the United States Constitution. We conclude there is implicit approval of the Alaska statute under congressional statutes which impose similar conditions on the sale of timber from federal lands. We reverse the district court's finding of invalidity.

The Commissioner of the Department of Natural Resources of Alaska is by law given discretion to condition particular sales of timber on primary manufacture in Alaska.[1] In 1980 the Commissioner gave notice of a proposed sale of state-owned timber at Icy Cape and announced that Alaska would require

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[1] The Commissioner of the Department of Natural Resources of Alaska, upon recommendation of the Director of the Division of Lands of the Department of Natural Resources, "shall determine the timber and other materials to be sold, and the limitations, conditions and terms of sale." Alaska Stat. § 38.05.115.

The Alaska regulations provide that:

(a) The director may require that primary manufacture of logs, cordwood, bolts or other similar products be accomplished within the State of Alaska.

primary manufacture within the state as a special provision of the contract.[2] The Commissioner stated the requirement was necessary to insure "a continuing supply of timber for existing

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(b) The term primary manufacture means manufacture which is first in order of time or development. When used in relation to sawmilling, it means

(1) the breakdown process wherein logs have been reduced in size by a headsaw or gang saw to the extent that the residual cants, slabs, or planks can be processed by resaw equipment of the type customarily used in log processing plants; or

(2) manufacture of a product for use without further processing, such as structural timbers (subject to a firm showing of an order or orders for this form of product).

(c) Primary manufacture, when used in reference to pulp ventures, means the breakdown process to a point where the wood fibers have been separated. Chips made from timber processing wastes shall be considered to have received primary manufacture. With respect to veneer or plywood production, it means the production of green veneer. Poles and piling, whether treated or untreated, when manufactured to American National Institute Standards specifications are considered to have received primary manufacture.

11 A.A.C. 76.130. The primary manufacture requirement is defined further by the Governor's Policy Statement of Primary Manufacture of May 7, 1974.

[2] The notice of public sale set out the primary manufacture contract term as follows:

Timber cut under this contract shall not be transported for primary manufacture outside the State of Alaska without written approval of the State.

Primary Manufacture is defined under 11 AAC 76.130 and the Governor's policy statement of May 1974. For purposes of this contract, cants may be manufactured from all species for export and will be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timbers cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in wane.

Chips are considered to have received primary manufacture.

industry" during temporary shortages of timber from federal lands. Final Finding for Icy Bay/Cape Yakatuga Sale at 2 (Excerpt of Record (E.R.) 121, 122).

Appellee South-Central Timber Development, Inc. is an Alaska corporation engaged in purchasing timber and processing it for sale. It does not own an operating mill in Alaska, and its practice had been to process Alaskan timber outside the state. When it learned of the new requirement, South-Central brought this action for injunctive relief against various state officials. The company claimed it was prevented from bidding on the Icy Cape sale by the added expense of in-state processing. The district court granted a temporary restraining order, and when it expired the applicants agreed to postpone the sale until a final decision on the merits.

Kenai Lumber Company, Inc. intended to bid at the Icy Cape sale to obtain timber for its sawmill in Alaska. The district court allowed Kenai to intervene in the suit as a defendant. Upon cross-motions for summary judgment, the district court granted summary judgment for plaintiff-appellee, and concluded that the primary manufacture requirement put an impermissible burden on interstate commerce.

It long has been settled that states may regulate in some areas of commerce, absent congressional action to displace such laws, *Cooley* v. *Board of Wardens of Port of Philadelphia*, 53 U.S. 298 (12 How.) (1851); but state statutes which discriminate against interstate commerce for the purpose of local, economic protection are invalid in virtually every case. *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 (1978). The rule has been invoked to invalidate state statutes which promote local processing industries by forbidding shipment of raw resources, *Foster-Fountain Packing* v. *Haydel*, 278 U.S. 1 (1928). The commerce clause by its own power invalidates such discriminatory statutes.

Despite the force of this rule, there are narrow exceptions, as in the case of a state proprietary activity. *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980). Alaska contends its statute is saved

by that exception here. We need not reach the question, however. This is not a case where the courts must apply the commerce clause absent a declaration by Congress respecting the economic regulation at issue. Here, Congress has acted to validate the state policy.

While there may be some outer limits to its power, it is generally accepted that Congress is free to approve and thereby validate commercial regulations otherwise beyond a state's authority. Congress can "confer upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 44.

The rule acknowledging congressional power to approve otherwise impermissible state regulation of interstate commerce usually is applied in cases where Congress has expressly authorized such regulation, *see, e.g., Western & Southern Life Insurance Co.* v. *State Board of Equalization of California*, 451 U.S. 648 (1981). But such express authorization is not always necessary. There will be instances, like the case before us, where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests.

The federal government has consistently endorsed restrictions on the interstate shipment of timber to protect the local processing capability of isolated areas, evincing a general federal policy of promoting geographic dispersion in the timber industry. Since 1928 the Forest Service has limited the export of unprocessed logs from National Forests in Alaska under general authority granted by the Organic Administration Act of June 4, 1897 (16 U.S.C. § 475, 551). In 1969 Congress set a quota on the unprocessed timber that could be exported from federal lands west of the 100th meridian (a line running south from the mid-point of the North Dakota-Canadian boundary, through central Texas). Lindell, *Log Export Restrictions of the Western States and British Columbia*, 7 (U.S. Dept. of Agri-

culture 1978) (E.R. 130). In 1973 Congress strengthened its policy by a complete ban on the export of unprocessed timber from such lands.[3]

When Alaska was admitted to statehood in 1959 and received title to a large portion of the territory's public lands, it continued to adhere, with limited exceptions, to preexisting federal policy.[4] Lindell, *Log Export Restrictions of the Western States and British Columbia*, 7 (U.S. Dept. of Agriculture 1978) (E.R. 135). The state's primary manufacture requirements duplicate those imposed on federal timber and serve the same objective, that of promoting industrial developments in isolated areas. The decision of Alaska's Commissioner of Natural Resources to condition the sale at Icy Cape on primary manufacture was made in the wake of a temporary suspension of federal timber sales from the Togass and Chugach National Forests. Final Findings on Icy Bay/Cape Yakatuga Sale at 2 (E.R. 122). Its purpose was to protect local processors from

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[3] The Forest Service regulations are found at 36 C.F.R. § 223.10(b) (1981). The Bureau of Land Management provisions are set forth at 43 C.F.R. §§ 5400.0-3(c), -5 (1981).

[4] The regulations for Alaska state:

> Unprocessed timber from National Forest System Lands in Alaska may not be exported from the United States or shipped to other States without prior approval of the Regional Forester. *This requirement is necessary to ensure the development and continued existence of adequate wood processing capacity in that State for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities.* In determining whether consent will be given for the export of timber, consideration will be given to, among other things, whether such export will (1) permit more complete utilization on areas being logged primarily for local manufacture, (2) prevent loss or serious deterioration of logs unsaleable locally because of an unforeseen loss of market, (3) permit the salvage of timber damaged by wind, insects, fire, or other catastrophe, (4) bring into use a minor species of little importance to local industrial development, or (5) provide material required to meet urgent and unusual needs of the Nation.

36 C.F.R. § 223.10(c) (1981) (emphasis added).

the resulting slack in demand for their services. The state's decision could not have been more in keeping with federal timber policy. In these circumstances, we find ample congressional acquiescence in Alaska's primary manufacture requirement. The judgment of the district court is REVERSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A80-311 Civil

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,
Plaintiff,

v.

ROBERT LERESCHE, Commissioner of Department of Natural Resources of the State of Alaska; GEOFFREY HAYNES, Director, Division of Natural Resources, and Deputy Commissioner of Department of Natural Resources of the State of Alaska; and THEODORE G. SMITH, Director of Division of Forest, Land and Water Management, of Department of Natural Resources of the State of Alaska,
Defendants,

KENAI LUMBER COMPANY,
Intervenor.

FILED
January 5, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

MEMORANDUM AND ORDER

VON DER HEYDT, Chief Judge.

THIS CAUSE comes before the court on cross motions by plaintiff and defendant for summary judgment, and defendant-intervenor's motion to dismiss. The parties agree that the sole issue to be decided is whether the State's requirement of primary manufacture violates the Commerce Clause of the

United States Constitution.[1] As the matter in controversy exceeds the sum of $10,000, this court has jurisdiction pursuant to 28 U.S.C. § 1331(a).

I. FACTS

In September, 1980, the State of Alaska gave notice that it would sell approximately 49,185,000 board feet of timber in the area of Icy Cape, Alaska, on October 23, 1980. The notice of the sale provided, pursuant to 11 A.A.C. § 76.130,[2] that "primary

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[1] U.S. Const., art. I § 8 provides in relevant part: "The Congress shall have Power . . . To regulate Commerce with foreign nations, and among the several states . . . ."

[2] 11 A.A.C. § 76.130 (1974) provides:

PRIMARY MANUFACTURE

(a) The director may require that primary manufacture of logs, cordwood, bolts or other similar products be accomplished within the State of Alaska.

(b) The term primary manufacture means manufacture which is first in order of time or development. When used in relation to sawmilling, it means

(1) the breakdown process wherein logs have been reduced in size by a headsaw or gang saw to the extent that the residual cants, slabs, or planks can be processed by resaw equipment of the type customarily used in log processing plants; or
(2) manufacture of a product for use without further processing, such as structural timbers (subject to a firm showing of an order or orders for this form of product).

(c) Primary manufacture, when used in reference to pulp ventures, means the breakdown process to a point where the wood fibers have been separated. Chips made from timber processing wastes shall be considered to have received primary manufacture. With respect to veneer or plywood production, it means the production of green veneer. Poles and piling, whether treated or untreated, when manufactured to American National Institute Standards specifications are considered to have received primary manufacture.

Authority: AS 38.05.020
AS 38.05.110
AS 38.05.115
AS 38.05.120

manufacture within the State of Alaska will be required as a special provision of the contract." The inclusion of the primary manufacture requirement in the timber sales contract requires a successful bidder to pre-cut the sale timber in Alaska prior to export.

Plaintiff South-Central Timber Development, Inc. (South-Central) is an Alaskan corporation engaged in the business of purchasing Alaska standing timber, logging such timber, and shipping the resulting logs into foreign commerce. Although South-Central desires to bid on the Icy Cape No. 2 timber sale, it is hampered by its lack of a working mill in Alaska. South-Central must take into account the added costs of having primary manufacture performed in-state. This added cost effectively precludes South-Central from bidding on the timber.

II. THE COMMERCE CLAUSE AND PRIMARY MANUFACTURE

The State and intervenor contend that the primary manufacture requirement is permissible under the commerce clause for two reasons: 1) Alaska's policy of requiring primary manufacture as a term of a state timber contract is consistent with federal policy as expressed by Congress; and, 2) by including primary manufacture as a term in the state timber contract, the state is not regulating interstate commerce; rather it is acting in a proprietary capacity as a market participant and is therefore exempt from commerce clause requirements.

A. Federal Policy Of Primary Manufacture

It is clear that if Congress had consented to the State's primary manufacture requirement, any commerce clause restrictions would be waived. *E.g. Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945). To determine whether Congress has consented to the requirement, the court must examine the relevant Congressional provisions in this area.

The State points out that the federal government historically has placed restrictions on the export of unprocessed logs from federal lands in the western states, including federal lands in Alaska. Since 1928, the United States Forest Service has restricted the export of unprocessed timber from national forest timber sales in Alaska under the general authority granted by Congress. 16 U.S.C. § 471 *et seq.* (1976) (National Forests).

Section 475 provides in part that one of the purposes for establishing a national forest is "to furnish a continuous supply of timber for use and necessities of the citizens of the United States . . . ." Section 551 allows the Secretary of Agriculture, under the provisions of § 471, to make necessary "rules and regulations and establish such service . . . to regulate . . . and to preserve the forests . . . ." Regulations currently in effect restrict the export, in unprocessed form, of timber harvested from sales in national forest land in Alaska. 36 C.F.R. § 223.10(i).[3]

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[3] 36 C.F.R. § 223.10(i)(1977) provides:

> Subject to the other provisions of this section, timber cut from the National Forests in the State of Alaska may not be exported from Alaska in the form of logs, cordwood, bolts, or other similar products necessitating primary manufacture elsewhere without prior consent of the Regional Forester. This requirement is determined to be necessary in order to assure the development and continued existence of adequate wood processing capacity in that State essential to the sustained utilization of timber from the National Forests located therein which is geographically isolated from other processing capacity. In determining whether consent will be given to the export of such timber, consideration will be given, among other things, to whether such export will (1) permit a more complete utilization of material on areas being logged primarily for products for local manufacture, (2) prevent loss or serious deterioration of logs unsalable locally because of an unforeseen loss of market, (3) permit the salvage of timber, damaged by wind, insects, or fire, (4) bring into use a minor species of little importance to local industrial development, or (5) provide material required to meet urgent and unusual needs of the Nation.

An examination of the relevant statutory provisions shows that Congress has not consented to any primary manufacture requirements imposed by the states. When Congress has exempted state laws from commerce clause restrictions, it has used language specifically directing that certain interstate commerce may be regulated as though it were purely local. *See* the Wilson Act, 27 U.S.C. § 121(1976); *see also* the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (1976) ("silence . . . of Congress shall not be construed to impose any barrier to . . . regulation . . . by the several states.").

Although Congress has authorized the Secretary of Agriculture to make necessary rules to regulate the national forests, and has imposed export quotas on unprocessed timber from federal lands, it has in no way expressly exempted state timber laws from commerce clause restrictions. Given Congress' silence, a negative is presumed to bar state action inimical to the national commerce, and in such cases the Supreme Court is "the final arbiter of the competing demands of state and national interests." *South Pacific Co.* v. *Arizona*, 325 U.S. at 769.

B. The State As A Proprietor

The State maintains that it is acting in a proprietary capacity (as the timber subject to the primary manufacture requirement is state owned) and is therefore unrestricted by the commerce clause. *Reeves* v. *Stake*, 447 U.S. 429, 100 S. Ct. 2271 (1980); *Hughes* v. *Alexandria Scrap*, 426 U.S. 794 (1976). The Supreme Court has made clear, however, that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *Philadelphia* v. *New Jersey*, 437 U.S. 617, 622 (1978). The court must determine whether *Alexandria Scrap* and *Reeves* allow the State to require primary manufacture of state-owned timber within Alaska as a condition of sale.

1. Alexandria Scrap And Reeves

In *Alexandria Scrap*, the Court upheld a Maryland statute which promoted the disposal of abandoned automobiles through cash payments to scrap processors. Even though the payments favored in-state processors, the Court found no commerce clause problems. Relying on the fact that Maryland was acting in a proprietary capacity, the Court held that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." 426 U.S. at 810.

In *Reeves*, the Court ruled that the commerce clause did not prohibit South Dakota from refusing to sell cement from a state owned and operated cement plant to out-of-state customers, pursuant to its policy of supplying South Dakota customers first. The Court noted that "[t]he basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law." 477 U.S. at 436, 100 S. Ct. at 2277.

The *Reeves* Court termed the holding in *Alexandria Scrap* the "general rule" as to states acting in a proprietary manner 477 U.S. at 440, 100 S. Ct. at 2279. The Court went on to concede the possibility of an exception, but reasoned: "in this case [there is] no sufficient reason to depart from the general rule." *Id.* Later, the Court addressed the possible limits to the *Alexandria Scrap* exemption when it considered the argument that if a state were allowed to hoard its resources "Pennsylvania might keep its coal, the northwest its timber, [and] the mining States their minerals." *West* v. *Kansas Nat. Gas Co.*, 221 U.S. 229, 255 (1911). The Court distinguished cement from natural resources such as coal, timber, wild game, and minerals, and noted that "South Dakota has not sought to limit access to the State's limestone or other materials used to make cement." 447 U.S. at 444, 100 S. Ct. at 2281.

Here the State is restricting the flow of a state-owned natural resource rather than a state-owned man-made commodity.

Timber is not a commodity which, when needed, is capable of being readily produced by any state at any time. Conversely, a state may enter the cement business, with little problem, in order to supply its region with needed cement. The uniqueness of a natural resource, the happenstance of its location, and the resulting national need for its unrestricted flow, prevent a state from economically discriminating in favor of its residents simply because a resource lies on state-owned land.

The court finds that the State's primary manufacture requirement goes beyond the *Alexandria Scrap* exemption, as a natural resource is involved. The *Alexandria Scrap* general rule is not a magic talisman which allows a state to place unconstitutional restrictions on a resource if it is state-owned. While the fact that a state owns a natural resource may allow it to favor its residents in the distribution of the resource in certain ways, a state may not "attach conditions to the use or disposition of the resource that might independently burden interstate commerce . . . ." Hellerstein, *Hughes* v. *Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources*, 1979 Sup.Ct.Rev. 51, 71 (1980).

Since the court has determined that the primary manufacture requirement goes beyond the *Alexandria Scrap* exemption, it must determine whether this requirement unconstitutionally burdens commerce.

2. The Pike Test

The Supreme Court has set forth the criteria for determining the validity of state actions affecting interstate commerce. The rule that emerges is that:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the

> local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citations omitted).

Under this test, the primary manufacture requirement is unconstitutional. The requirement does not regulate even-handedly, as it does not fall evenly on companies with in-state timber mills and companies with out-of-state timber mills; the requirement precludes South-Central from competing on equal footing with companies that possess in-state mills capable of performing primary manufacture.

Additionally, the public interest served goes beyond the Court's sanction of permissible commerce clause burdens. *See e.g. Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959) (state regulation furthering public safety, but burdening commerce held permissible). Here the purpose served is economic—"to protect existing industries, provide for the establishment of new industries, [and] derive revenue from all timber resources . . . ." Governor's Office News Release (June 30, 1961) (Governor Egan's policy statement on primary manufacture).

Through the years, the Supreme Court has been alert to the evils of economic protectionism. The Court frequently has indicated that the purpose of the commerce clause was to avoid "the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U.S. 332, 325 (1979). "Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Philadelphia* v. *New Jersey*, 437 U.S. at 624.

Turning to the "burden" side of the *Pike* test, the primary manufacture requirement places a substantial rather than an incidental burden on commerce. The application of the primary manufacture requirement would, at the least, require companies without mills in Alaska to lease mill facilities within the

state capable of performing the requirement. Indeed, the "Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home state that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal." *Pike*, 397 U.S. at 145.

Finally, the court finds that less burdensome means are available to the State to achieve the same end. For example, the state may implement a statutory scheme which encourages in-state processing rather than action which bars out-of-state processing. This is, however, a legislative question; the court simply notes other schemes are available.

Accordingly, IT IS ORDERED:

1) THAT plaintiff's motion for summary judgment is granted.

2) THAT defendant's motion for summary judgment is denied and intervenor's motion to dismiss is denied.

3) THAT the clerk may prepare a final judgment form stating that the named defendants or any official of the State of Alaska are permanently enjoined from requiring primary manufacture of state-owned timber pursuant to 11 A.A.C. § 76.130, as the requirement of primary manufacture violates art. I, § 8 of the United States Constitution.

DATED at Anchorage, Alaska, this 5th day of January, 1981.

/s/ JAMES A. VON DER HEYDT
United States District Judge

cc: Leroy E. DeVeaux
Mark L. Figura
Shelley Higgins, Assistant Attorney General

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Civil Action File No. A80-311

SOUTH-CENTRAL TIMBER DEVELOPMENT, INC.,

v.

ROBERT LERESCHE, Commissioner of the Department of Natural Resources of the State of Alaska, *et al.*

This action came on for (hearing) before the Court, Honorable James A. von der Heydt, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that the named defendants or any official of the State of Alaska are permanently enjoined from requiring primary manufacture of state-owned timber pursuant to 11 A.A.C. § 76.130, as the requirement of primary manufacture violates art. I, Section 8 of the United States Constitution.

JUDGMENT

FILED
January 6, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

Costs taxed by Clerk in amount
of $112.00 on January 21, 1981.

/s/ D. COKER

D. Coker
Deputy Clerk

Dated at Anchorage, Alaska, this 6th day of January, 1981.

APPROVED:

/s/ JAMES A. VON DER HEYDT

James A. von der Heydt
United States District Judge

JOANN MYRES

JoAnn Myres
Clerk of Court

By: /s/ DONNA COKER

Donna Coker
Deputy Clerk

COPY FILED IN O. & J. VOL. 1755

PAGE ____.

APPENDIX D

CONSTITUTIONAL PROVISION, STATUTE, AND REGULATIONS INVOLVED

Article 1, § 8, Cl. 3 Of The U.S. Const. reads:

The Congress shall have power . . .

* * *

to regulate commerce with foreign nations and among the several states, and with Indian Tribes; . . . .

Alaska Statute

Sec. 38.05.115. Limitations and conditions of sale.

(a) The commissioner, upon recommendation of the director, shall determine the timber and other materials to be sold, the limitations, conditions and terms of sale. The limitations, conditions and terms shall include the utilization, development and maintenance of the sustained yield principle, subject to preference among other beneficial uses. The director may negotiate sales of timber or materials without advertisement and on the limitations, conditions, and terms which he considers are in the best interests of the state, subject to the approval of the commissioner. However, not more than 500 M.B.M. or equivalent other measure of timber or more than $5,000 of materials may be sold by non-advertised, negotiated sale to the same purchaser within a one-year period.

(b) Negotiated sales for timber or materials not exceeding a value of $500 are exempt from the provisions of AS 34.15.150 (§ 2 art VI ch 169 SLA 1969; am § 1 ch 66 SLA 1969; am § 9 ch 257 SLA 1976).

Alaska Admin. Code, tit. 11, § 71.230 (1982), provides as follows:

PRIMARY MANUFACTURE OF TIMBER. (a) The director will, in his discretion, require that primary manufacture of timber removed under this chapter be accomplished within the state to the extent consistent with law.

(b) For the purposes of this section, the director will consider timber which has been manufactured into a prod-

uct for use without further processing as having been primarily manufactured only if the director determines that there is a market for the product.

Alaska Admin. Code, tit. 11, § 71.910 (1982), provides in pertinent part as follows:

DEFINITIONS. In this chapter

* * *

(11) 'primary manufacture' means manufacture which is first in order of time or development; the term

(A) when used in relation to a sawmilling operation, means the breakdown process in which logs are reduced in size by a headsaw, gangsaw, or edger to the extent that the residual cants, slabs or planks do not exceed a nominal eight and three-quarters inches in thickness;

(B) when used in relation to a pulp operation, means the breakdown process to the point at which wood fibers have been separated;

(C) when used in relation to an operation for veneer for plywood production, it means the production of green veneer;

(D) when used in relation to poles or piling, whether treated or untreated, means manufacture for the purpose of use as poles or piling; and

(E) when used in relation to timber processing wastes, means manufacture into chips;

* * *

A regulation of the Alaska State Department of Natural Resources of 1974, Alaska Admin. Code. tit. 11, § 76.130 (1974) (Repealed 1982), provides in pertinent part:

PRIMARY MANUFACTURE.

(a) The director may require that primary manufacture of logs, cordwood, bolts or other similar products be accomplished within the State of Alaska.

(b) The term primary manufacture means manufacture which is first in order of time or development. When used in relation to sawmilling, it means

(1) the breakdown process wherein logs have been reduced in size by a headsaw or gangsaw to the extent that the residual cants, slabs or planks can be processed by resaw equipment of the type customarily used in log processing plants; or

(2) manufacture of a product for use without further processing, such as structural timbers (subject to a firm showing of an order or orders for this form or product).

(c) Primary manufacture, when used in reference to pulp ventures, means the breakdown process to a point where the wood fibers have been separated. Chips made from timber processing wastes shall be considered to have received primary manufacture. With respect to veneer or plywood production, it means the production of green veneer. Poles and piling, whether treated or untreated, when manufactured to American National Institute Standards specifications are considered to have received primary manufacture.

APPENDIX E

OTHER RELEVANT STATUTES AND REGULATIONS

I. Federal Statutes and Regulations

The Organic Administration Act of June 4, 1897, 30 Stat. 34, as amended by Act of March 4, 1907, ch. 2907, 34 Stat. 1269, 16 U.S.C. § 475, provides in pertinent part:

> All public lands designated and reserved prior to June 4, 1897, by the President of the United States under the provisions of section 471 of this title, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as national forests under said section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Organic Administration Act of June 4, 1897, 30 Stat. 35, as amended by Act of October 23, 1962, Pub. L. No. 87-869, § 6, 76 Stat. 1157; Act of August 31, 1964, Pub. L. No. 88-537, 78 Stat. 745; Act of October 21, 1976, Pub. L. No. 94-579, Title VII, § 706(a), 90 Stat. 2793, 16 U.S.C. § 551, provides:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this section, sections 473 to 478 and 479 to 482 of this title or such rules and regulations shall be punished by a fine of

not more than $500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States magistrate specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in section 3401(b) to (e) of Title 18.

The Act of March 29, 1944, 58 Stat. 132, 16 U.S.C. § 583, is as follows:

In order to promote the stability of forest industries, of employment, of communities, and of taxable forest wealth, through continuous supplies of timber; in order to provide for a continuous and ample supply of forest products; and in order to secure the benefits of forests in maintenance of water supply, regulation of stream flow, prevention of soil erosion, amelioration of climate, and preservation of wildlife, the Secretary of Agriculture and the Secretary of the Interior are severally authorized to establish by formal declaration, when in their respective judgments such action would be in the public interest, cooperative sustained-yield units which shall consist of federally owned or administered forest land under the jurisdiction of the Secretary establishing the unit and, in addition thereto, land which reasonably may be expected to be made the subject of one or more of the cooperative agreements with private landowners authorized by section 583a of this title.

Section 22 of the Alaska Native Claims Settlement Act of December 18, 1971, as amended; Pub. L. No. 92-203, 85 Stat. 713, as amended on January 2, 1976, Pub. L. No. 94-204, 89 Stat. 1156; as amended on December 2, 1980, Pub.L. No. 96-487, 94 Stat. 2496; 43 U.S.C. § 1621(k), states in pertinent part as follows:

Any patents to lands under this Chapter which are located within the boundaries of a national forest shall contain such conditions as the Secretary deems necessary to assure that:

(1) The sale of any timber from such sale shall, for a period of five years, be subject to the same restrictions relating to the export of timber from the United States

as are applicable to national forest lands in Alaska under the rules and regulations of the Secretary of Agriculture; and

(2) Such lands are managed under the principle of sustained yield and under management practices for the protection and enhancement of environmental quality no less stringent than such management practices on adjacent national forest lands for a period of twelve years.

Section 2 of the Export Administration Act of September 29, 1979, Pub.L. No. 96-72, 93 Stat. 503, 50 U.S.C. app. § 2401, reads in pertinent part as follows:

Exports contribute significantly to the economic well-being of the United States and the stability of the world economy by increasing employment and production in the United States, and by strengthening the trade balance and the value of the United States dollar, thereby reducing inflation. The restriction of exports from the United States can have serious adverse effects on the balance of payments and on domestic employment, particularly when restrictions applied by the United States are more extensive than those imposed by other countries.

Section 3 of the Export Administration Act of September 29, 1979, Pub. L. No. 96-72, 93 Stat. 504, 50 U.S.C. app. § 2402, reads in pertinent part:

The Congress makes the following declarations:

(1) It is the policy of the United States to minimize uncertainties in export control policy and to encourage trade with all countries with which the United States has diplomatic or trading relations, except those countries with which such trade has been determined by the President to be against the national interest.

(2) It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary—

(A) to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of coun-

tries which would prove detrimental to the national security of the United States;

(B) to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations; and

(C) to restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand.

(3) It is the policy of the United States (A) to apply any necessary controls to the maximum extent possible in cooperation with all nations, and (B) to encourage observance of a uniform export control policy by all nations with which the United States has defense treaty commitments.

(4) It is the policy of the United States to use its economic resources and trade potential to further the sound growth and stability of its economy as well as to further its national security and foreign policy objectives.

(5) It is the policy of the United States—

(A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States or against any United States person;

(B) to encourage and, in specified cases, require United States persons engaged in the export of goods or technology or other information to refuse to take actions, including furnishing information or entering into or implementing agreements, which have the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against a country friendly to the United States or against any United States person; and

(C) to foster international cooperation and the development of international rules and institutions to assure reasonable access to world supplies.

(6) It is the policy of the United States that the desirability of subjecting, or continuing to subject, particular goods or technology or other information to United States export controls should be subjected to review by and

consultation with representatives of appropriate United States Government agencies and private industry.

(7) It is the policy of the United States to use export controls, including license fees, to secure the removal by foreign countries of restrictions on access to supplies where such restrictions have or may have a serious domestic inflationary impact, have caused or may cause a serious domestic shortage or have been imposed for purposes of influencing the foreign policy of the United States. In effecting this policy, the President shall make every reasonable effort to secure the removal or reduction of such restrictions, policies, or actions through international cooperation and agreement before resorting to the imposition of controls on exports from the United States. No action taken in fulfillment of the policy set forth in this paragraph shall apply to the export of medicine or medical supplies.

(8) It is the policy of the United States to use export controls to encourage other countries to take immediate steps to prevent the use of their territories or resources to aid, encourage, or give sanctuary to those persons involved in directing, supporting, or participating in acts of international terrorism. To achieve this objective, the President shall make every reasonable effort to secure the removal or reduction of such assistance to international terrorists through international cooperation and agreement before resorting to the imposition of export controls.

(9) It is the policy of the United States to cooperate with other countries with which the United States has defense treaty commitments in restricting the export of goods and technology which would make a significant contribution to the military potential of any country or combination of countries which would prove detrimental to the security of the United States and of those countries with which the United States has defense treaty commitments.

(10) It is the policy of the United States that export trade by United States citizens be given a high priority and not be controlled except when such controls (A) are necessary to further fundamental national security, foreign policy, or short supply objectives, (B) will clearly further such objectives, and (C) are administered consistent with basic standards of due process.

(11) It is the policy of the United States to minimize restrictions on the export of agricultural commodities and products.

Section 7 of the Export Administration Act of September 29, 1979, Pub. L. No. 96-72, 93 Stat. 515, 50 U.S.C. app. § 2406, reads in pertinent part:

Short supply controls

* * *

(g) Agricultural commodities.—(1) The authority conferred by this section shall not be exercised with respect to any agricultural commodity, including fats and oils or animal hides or skins, without the approval of the Secretary of Agriculture. The Secretary of Agriculture shall not approve the exercise of such authority with respect to any such commodity during any period for which the supply of such commodity is determined by the Secretary of Agriculture to be in excess of the requirements of the domestic economy except to the extent the President determines that such exercise of authority is required to carry out the policies set forth in subparagraph (A) or (B) of paragraph (2) of section 3 of this Act [section 2402(2)(A) or (B) of this appendix]. The Secretary of Agriculture shall, by exercising the authorities which the Secretary of Agriculture has under other applicable provisions of law, collect data with respect to export sales of animal hides and skins.

(2) Upon approval of the Secretary, in consultation with the Secretary of Agriculture, agricultural commodities purchased by or for use in a foreign country may remain in the United States for export at a later date free from any quantitative limitations on export which may be imposed to carry out the policy set forth in section 3(2)(C) of this Act [section 2402 (2)(C) of this appendix] subsequent to such approval. The Secretary may not grant such approval unless the Secretary receives adequate assurance and, in conjunction with the Secretary of Agriculture, finds (A) that such commodities will eventually be exported, (B) that neither the sale nor export thereof will result in an excessive drain of scarce materials and have a serious domestic inflationary impact, (C) that storage of such commodities in the United States will not unduly limit the space available for storage of domestically owned

commodities, and (D) that the purpose of such storage is to establish a reserve of such commodities for later use, not including resale to or use by another country. The Secretary may issue such regulations as may be necessary to implement this paragraph.

(3) If the authority conferred by this section or section 6 [section 2405 of this appendix] is exercised to prohibit or curtail the export of any agricultural commodity in order to carry out the policies set forth in subparagraph (B) or (C) of paragraph (2) of section 3 of this Act [section 2402(2)(B) or (C) of this appendix], the President shall immediately report such prohibition or curtailment to the Congress, setting forth the reasons therefor in detail. If the Congress, within 30 days after the date of its receipt of such report, adopts a concurrent resolution disapproving such prohibition or curtailment, then such prohibition or curtailment shall cease to be effective with the adoption of such resolution. In the computation of such 30-day period, there shall be excluded the days on which either House is not in session because of an adjournment of more than 3 days to a day certain or because of an adjournment of the Congress sine die.

* * *

(i) Unprocessed red cedar.—(1) The Secretary shall require a validated license, under the authority contained in subsection (a) of this section, for the export of unprocessed western red cedar (Thuja pilcata) logs, harvested from State or Federal lands. The Secretary shall impose quantitative restrictions upon the export of unprocessed western red cedar logs during the 3-year period beginning on the effective date of this Act as follows:

(A) Not more than thirty million board feet scribner of such logs may be exported during the first year of such 3-year period.

(B) Not more than fifteen million board feet scribner of such logs may be exported during the second year of such period.

(C) Not more than five million board feet scribner of such logs may be exported during the third year of such period.

After the end of such 3-year period, no unprocessed western red cedar logs may be exported from the United States.

(2) The Secretary shall allocate export licenses to exporters pursuant to this subsection on the basis of a prior history of exportation by such exporters and such other factors as the Secretary considers necessary and appropriate to minimize any hardship to the producers of western red cedar and to further the foreign policy of the United States.

(3) Unprocessed western red cedar logs shall not be considered to be an agricultural commodity for purposes of subsection (g) of this section.

(4) As used in this subsection, the term "unprocessed western red cedar" means red cedar timber which has not been processed into—

(A) lumber without wane;

(B) chips, pulp, and pulp products;

(C) veneer and plywood;

(D) poles, posts, or pilings cut or treated with preservative for use as such and not intended to be further processed; or

(E) shakes and shingles.

Title III § 301 of an Appropriation Act of November 27, 1979, Pub. L. No. 96-126, 93 Stat. 979, reads in pertinent part as follows:

No part of any appropriation under this Act shall be available to the Secretaries of the Interior and Agriculture for use for any sale hereafter made of unprocessed timber from Federal lands west of the 100th meridian in the contiguous 48 States which will be exported from the United States, or which will be used as a substitute for timber from private lands which is exported by the purchaser: *Provided*, That this limitation shall not apply to specific quantities of grades and species of timber which said Secretaries determine are surplus to domestic lumber and plywood manufacturing needs.

Title III § 308 of an Appropriation Act of November 27, 1979, Pub. L. No. 96-126, 93 Stat. 980, reads in pertinent part as follows:

> Notwithstanding the provisions of any other law, the State of Alaska is exempted from application of the provisions of section 7(i) of the Export Administration Act of 1979 (Public Law 96-72).

International Trade Administration, Commerce and Foreign Trade, 15 C.F.R. § 377.7 (1982), reads in pertinent part:

> *Unprocessed western red cedar.*
>
> (a) *General.* The export from the United States to any destination, including Canada, of unprocessed western red cedar as defined below is prohibited except pursuant to a validated export license issued by the Office of Export Administration.
>
> (b) *Definitions.* When used in this section, the following terms have the meanings indicated.
>
> (1) *Unprocessed western red cedar.* Western red cedar (thuja plicata) timber, logs, cants, flitches, and processed lumber containing wane on one or more sides, as listed in Supplement No. 4 to this part, but excluding:
>
> (i) Lumber without wane;
>
> (ii) Chips, pulp, and pulp products;
>
> (iii) Veneer and plywood;
>
> (iv) Poles, posts, or pilings cut or treated with preservative for use as such and not intended to be further processed; and
>
> (v) Shakes and shingles.
>
> Commodities excluded above are referred to as 'processed western red cedar'.
>
> (2) *Federal and state lands.* Federal and state lands excluding lands in the State of Alaska and lands held in trust by any federal or state official or agency for a recognized Indian tribe or for any member of such tribe.
>
> * * *

(C) *Export quotas.* Annual quotas for the export of unprocessed western red cedar harvested from state and federal lands, produced from commodities so harvested, or which became available for export through substitution for such commodities, are established as follows:

(1) For the fiscal year October 1, 1979—September 30, 1980: 30 MMBF (million board feet scribner);

(2) For the fiscal year October 1, 1980—September 30, 1981: 15 MMBF (million board feet scribner);

(3) For the fiscal year October 1, 1981—September 30, 1982: 5 MMBF (million board feet scribner).

Thereafter the export of unprocessed western red cedar harvested from state and federal lands is prohibited.

Unprocessed western red cedar harvested from private lands, including Indian lands, or in Alaska, or produced from commodities so harvested, is subject to validated licensing but is exempt from the foregoing quota restrictions. Processed western red cedar irrespective of its origin is exempt from both quota restriction and validated licensing.

* * *

(g) *Issuance of export licenses. . . .*

(1) *Unprocessed western red cedar harvested from private lands or in Alaska.* An application for a validated license to export an unprocessed western red cedar commodity listed in Supplement No. 4 to this part which was harvested from lands other than federal or state lands will be considered for approval without quantitative limitation if submitted with supporting documentation as required by paragraphs (h)(1) or (3) below.

(2) *Unprocessed western red cedar harvested from state or federal lands.* An application for a validated license to export an unprocessed western red cedar commodity listed in Supplement No. 4 to this part will be considered, subject to quota limitation, if submitted with supporting documentation as required by paragraphs (h)(2) or (3) below. Each license issued will be charged against the quota allocation of the exporter or

of another person or persons who hold(s) a quota allocation. A quota allocation may only be so charged with the written consent of the quota holder and only if the quota holder now holds or previously held title to, the particular commodities to be exported. Where necessary to cover an entire shipment, portions of that shipment may be charged to more than one quota allocation.

(h) *Documentation.* . . .

(1) *Unprocessed western red cedar harvested from lands other than federal or state lands.* (i) A sworn affidavit by the applicant stating that the commodities listed on the application were not harvested from state or federal lands, were not produced from commodities harvested from state or federal lands, and did not become available for export through substitution of commodities so harvested or produced [sic]. If the applicant is not the harvester or producer of the commodities to be exported, the affidavit must identify the harvester or producer, and from each intermediate party or parties who held title to the commodities between harvesting and purchase by the applicant.

Forest Service Sale and Disposal of Timber, 36 C.F.R. § 223.10 (1982), reads in pertinent part:

Timber export and substitution restrictions.

(a) The following definitions apply to the provisions of this section:

(1) Export means either direct or indirect export to a foreign country and occurs on the date that a person enters into a contract or other binding transaction for the export of unprocessed timber or, if that date cannot be established, when unprocessed timber is found in an export yard or pond, bundled or otherwise prepared for shipment, or aboard an ocean-going vessel. An export yard or pond is an area where sorting and/or bundling of logs for shipment outside the United States is accomplished. Unprocessed timber, whether from National Forest System or private lands, is exported directly when exported by the National Forest timber purchaser. Timber is exported indirectly when export occurs as a result of a sale to another person or as a consequence of any subsequent transaction.

(2) Historic level means the average annual volume of unprocessed timber purchased or exported in calendar years 1971, 1972, and 1973.

(3) Private lands mean lands held or owned by a private person. Nonprivate lands include, but are not limited to, lands held or owned by the United States, a State or political subdivision thereof, or any other public agency, or lands held in trust by the United States for Indians.

(4) Substitution means the purchase of unprocessed timber from National Forest System lands to be used as replacement for unprocessed timber from private lands which is exported by the purchaser. Substitution occurs when (i) a person increases purchases of National Forest timber in any Calendar year more than 10 percent above their historic level and in the same calendar year exports unprocessed timber from private land in the tributary area; or (ii) a person increases exports of unprocessed timber from private land in any tributary area more than 10 percent above their historic level in any calendar year while they have National Forest timber under contract.

(5) Tributary area means the geographic area from which unprocessed timber is delivered to a specific processing facility or complex. A tributary area is expanded when timber outside an established tributary area is hauled to the processing facility or complex.

(6) Unprocessed timber, except western red cedar in the contiguous 48 States, means trees or portions of trees having a net scale content not less than 33-1/3 percent of the gross volume, or the minimum piece specification set forth in the timber sale contract, in material meeting the peeler and sawmill log grade requirements published in the January 1, 1980—Official Log Scaling and Grading Rules used by Log Scaling and Grading Bureaus on the West Coast; cants to be subsequently manufactured exceeding 8-3/4 inches in thickness; cants of any thickness reassembled into logs; and split or round bolts, except for aspen, or other roundwood not processed to standards and specifications suitable for end-product use. Unprocessed timber shall not

mean pulp (utility) grade logs and Douglas-fir special cull logs or timber processed into the following:

(i) Lumber and construction timbers, regardless of size, sawn on four sides;

(ii) Chips, pulp, and pulp products;

(iii) Green veneer and plywood;

(iv) Poles, posts, or piling cut or treated for use as such;

(v) Cants cut for remanufacture, 8-3/4 inches in thickness or less;

(vi) Aspen bolts, not exceeding 4 feet in length.

(7) Unprocessed western red cedar timber in the contiguous 48 States means trees or portions of trees of that species which have not been processed into (i) lumber of American Lumber Standards Grades of Number 3 dimension or better, or Pacific Lumber Inspection Bureau Export R-List Grades of Number 3 Common or better; (ii) chips, pulp, and pulp products; (iii) veneer plywood; (iv) poles, posts, or piling cut or treated with preservatives for use as such and not intended to be further processed; or (v) shakes and shingles; provided that lumber from private lands manufactured to the standards established in the lumber grading rules of the American Lumber Standards Association or the Pacific Lumber Inspection Bureau and manufactured lumber authorized to be exported under license by the Department of Commerce shall be considered processed.

(8) Person means an individual, partnership, corporation, association, or other legal entity and includes any subsidiary, subcontractor, parent company, or other affiliate. Business entities are considered affiliates for the entire calendar year when one controls or has the power to control the other or when both are controlled directly or indirectly by a third person during any part of the calendar year.

(9) Purchase occurs when a person is awarded a contract to cut National Forest timber or through the approval of a third party agreement by the Forest Service.

(10) Purchaser means a person that has purchased a National Forest Service timber sale.

(b) Unprocessed timber from National Forest System lands west of the 100th Meridian in the contiguous 48 States may not (1) be exported from the United States; (2) be used in substitution for unprocessed timber from private lands which is exported by the purchaser; or (3) be sold, traded, exchanged, or otherwise given to any person who does not agree to manufacture it to meet the processing requirements of this section and/or require such a processing agreeent in any subsequent resale or other transaction. This limitation on export or substitution does not apply to species of timber previously found to be surplus to domestic needs or to any additional species, grades, or quantities of timber which may be found by the Secretary to be surplus to domestic needs.

(c) Unprocessed timber from National Forest System lands in Alaska may not be exported from the United States or shipped to other States without prior approval of the Regional Forester. This requirement is necessary to ensure the development and continued existence of adequate wood processing capacity in that State for the sustained utilization of timber from the National Forests which are geographically isolated from other processing facilities. In determining whether consent will be given for the export of timber, consideration will be given to, among other things, whether such export will (a) permit more complete utilization on areas being logged primarily for local manufacture, (2) prevent loss or serious deterioration of logs unsaleable locally because of an unforeseen loss of market, (3) permit the salvage of timber damaged by wind, insects, fire or other catastrophe, (4) bring into use a minor species of little importance to local industrial development, or (5) provide material required to meet urgent and unusual needs of the Nation.

(d) Prior to a determination by the Secretary of Agriculture that a species, grade, or quantity of unprocessed timber is surplus to domestic needs, a public hearing shall be held to seek advice and counsel on the needs of domestic users and processors. Notice of any such determination shall be published in the FEDERAL REGISTER. Any determination of surplus timber may be withdrawn by the Secretary following a public notice which permits in-

terested persons to comment. Public hearings will be conducted in accordance with the following procedures:

(1) Notice will be published in the FEDERAL REGISTER and in a newspaper of general circulation within the area affected by the proposed determination at least 15 days prior to the hearing and persons known to be interested will be notified directly.

(2) The time, place, and conduct of the hearing will be coordinated with the Department of the Interior and shall be at a convenient location within the area affected.

(3) The hearing record shall remain open for at least 10 calendar days following the hearing for receipt of additional written statements.

(e) For false certification of documents relating to export or substitution and/or other violations of export and substitution requirements by the purchaser of timber from National Forest System lands, the Forest Service may cancel the subject contract, debar the involved person or persons from bidding on National Forest timber, or initiate other action as may be provided by law or regulation.

II. State Statutes

1973 Cal. Stat. 657, an Act with the effective date of January 1, 1974, Cal. Pub. Res. Code § 4650.1 (West Supp. 1982) states as follows:

Sales to primary manufactures; dimensions; violations; penalty; rules and regulations

Notwithstanding any other provision of law, timber from state forests shall not be sold to any primary manufacturer, or to any person for resale to a primary manufacturer, who makes use of such timber at any plant not located within the United States unless it is sawn on four sides to dimensions not greater than 4 inches by 12 inches.

Any purchaser of timber from state forests who makes use of such timber in violation of this section shall be prohibited from purchasing state forest timber for a

period of five years and may have his license suspended for a period of up to six months.

The department may adopt appropriate regulations to prevent the substitution of timber from state forests for timber exported from private timberlands.

An Act of 1905, as amended, 1905 Idaho Sess. Laws 145, Idaho Code § 58-403 (1905) (Amended, 1921, 1935, and 1974):

Application to purchase timber—Limitations on sale of timber.—Any person desiring to purchase timber on any lands owned by the state, shall make application in writing to the director of the department of lands; which application shall contain a complete description by legal subdivisions of the lands upon which it is desired to purchase timber and a provision that if he is the successful bidder he will furnish such bond as may be required by the state board of land commissioners; conditioned, that he will comply with all rules and regulations made by the state board of land commissioners pertaining to the cutting and removal of said timber and the disposal of slashings and debris; the protection from fires or other damage of all trees or timber which are reserved from sale, and such other conditions as may be imposed by the state board of land commissioners with reference to any particular tract of timber sold; provided, however, that this provision does not prohibit the state board of land commissioners from offering for sale, or selling, timber without application having first been filed, and such authority is hereby expressly given to the state board of land commissioners. The state board of land commissioners are hereby required when contracting for the sale of timber on lands owned by the state to prescribe that the timber cut from said lands under said contract shall be manufactured into lumber or timber products within the state of Idaho; provided, that the sale of any timber to be used in the manufacture of wood pulp shall be excepted from the above provision.

Act of 1961, 1961 Or. Laws 700, 1963 Or. Laws 298, 1981 Or. Laws 823, Or. Rev. Stat. 526.805.

Processing of timber sold by state or local governments. All timber, except white (Port Orford) cedar timber, sold by the State of Oregon, or any of its political subdivisions,

shall be primarily processed in the United States. For purposes of this section 'primarily processed' shall mean that stage of manufacture next beyond the log form of said timber.

Act of 1981, 1981 Or. Laws 823, Or. Rev. Stat. 526.835 (formerly Or. Rev. Stat. 526.810):

Penalty for selling certain logs for delivery outside United States. Any person who wilfully purchases or sells for delivery outside of the boundaries of the United States in log form any timber, except white (Port Orford) cedar timber, severed from land owned by the State of Oregon or any political subdivision thereof shall be guilty of a misdemeanor.

APPENDIX F

OREGON ATTORNEY GENERAL'S STATEMENTS

No. 5203 **April 18, 1961**

Honorable George Van Hoomissen
State Representative

You have requested the opinion of this office concerning the constitutionality of House Bill No. 1663, introduced and read for the first time on February 28, 1961.

The question of the bill's constitutionality centers in subsection (1) of § 2, which reads:

"(1) No timber sold by the State of Oregon or any political subdivision thereof shall be sold by the purchaser of such timber or subsequent purchasers of the logs obtained from such timber for delivery in log form beyond the continental limits of the United States. All contracts entered into by the State Board of Forestry for the sale of timber owned by the State of Oregon and all contracts entered into by any governing body of a political subdivision of the State of Oregon for the sale of timber owned by such political subdivision shall provide that no timber included in any such sale shall be sold for delivery in log form beyond the continental limits of the United States."

At the very outset this statute meets the full length impact of Article I, § 8, clause 3, of the Constitution of the United States. This clause provides:

"The Congress shall have Power * * *

* * *

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

It is sometimes expressed that state legislation, when it does not conflict with the laws or the Constitution of the United States, may operate in the field. This generalization must, of course, be qualified where the power of the national govern-

ment is exclusive. In the case of Leisy v. Hardin, (1889) 135 U.S. 100, 34 L. Ed. 128, 132, the court said:

> "Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammelod. [citing cases]"

The proposed statute now under consideration occupies the position of imposing a burden upon foreign commerce and thus encroaches upon the exclusive power of Congress. This statute does not act upon the subject matter merely through local instruments only, while it is within the state, but acts directly in such a manner as to affect this commodity through its entire voyage.

It was pointed out in the above quoted case that where state laws alleged to be regulations of commerce among the states were sustained, they were laws dealing with bridges or dams across streams, wholly within the state, or police or health laws or other related areas which were not of a commercial nature.

In Brown et al. v. The State of Maryland, (U.S. 1827) 12 Wheat. 419, 6 L. Ed. 678, 685, the court stated:

> ". . . There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. * * *"

To show the effect of such proposed legislation on the power of the national government we need only reverse the above statement in Brown et al. v. The State of Maryland, supra, and state that there is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its exportation from the country. The one would be a necessary consequence of the other.

It requires no great foresight and, in reality, only a brief retrospection to realize the consequences which have resulted and would again occur if such discriminatory powers were within the province of state legislation. The case of The Dubuque & Sioux City Railroad Co. v. Richmond, (U.S. 1874) 19 Wall. 584-590, 22 L. Ed. 173, 176, points out the principle that:

> "The power to regulate commerce among the several states was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation * * *."

My opinion, in view of the constitutional principles heretofore reviewed, is that House Bill No. 1663 is an invasion upon the exclusive power of Congress to regulate in the area of foreign commerce.

ROBERT Y. THORNTON,
Attorney General,
By E.C. Foxley, Deputy.

DEPARTMENT OF JUSTICE

100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-4400
February 19, 1982

The Honorable Ted Bugas
State Representative
367 State Capitol
Salem, Oregon 97310

Re: Opinion Request OP-5216

Dear Representative Bugas:

This letter opinion is issued in response to four questions you ask concerning the constitutionality of various existing and proposed provisions of state law restricting the export of unprocessed logs grown in Oregon, on land owned by the state or by other public bodies.

We conclude that such laws are probably unconstitutional. This conclusion is based upon substantial research and analysis performed to this time. It is also consistent with an earlier opinion of this office issued two decades ago. Neither research nor analysis, however, has been completed to the extent we would feel necessary for the issuance of a formal opinion reaching a conclusion that an existing state law is unconstitutional. It would be our duty to defend the validity of any state law against challenge, unless it is clearly and unequivocally in violation of the state or federal constitutions.

Such further work, however, could not in our judgment be productive at this time. The case of *South-Central Timber Development, Inc.* v. *Le Resche*, 511 F Supp 139 (C Alaska 1981) is now on appeal, and the decision by the U.S. Court of Appeals for the Ninth Circuit (Case No. 81-3081) will probably be dispositive of most of the issues raised in your opinion request. Even to the extent the forthcoming decision is not dispositive, the Ninth Circuit decision must certainly be taken

into careful account. We therefore conclude that it would be both premature and wasteful of our resources to do the further work necessary to furnish you with a formal opinion, which presently could not be definitive because of the pending case.

We nevertheless furnish you with an outline of the research and reasoning which leads us to the conclusion stated in the second paragraph of this letter.

Your first question is whether ORS 526.805 to 526.835 violate the United States Constitution or the Oregon Constitution. ORS 526.805 requires that any timber (except Port Orford Cedar) sold by the state or any of its political subdivisions must be primarily processed in the United States. ORS 526.835 makes it a misdemeanor to purchase or sell such timber in log form severed from land owned by the state or any of its political subdivisions, for delivery outside of the United States.

ORS 526.815 formerly allowed a permit to be obtained for export of such timber if there was no reasonable market for it in the United States. Oregon Laws 1981, ch 823 repealed this and related statutes, and amended ORS 526.805 and 526.835 to delete references to such export permits.

The state cannot under any circumstances enact a law forbidding export of unprocessed timber generally, or of any product of Oregon, without being in clear violation of the Foreign Commerce Clause of the United States Constitution, United States Const Art I, sec 8 provides:

> "The Congress shall have Power . . . .
>
> ". . . .
>
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."

It was early established that this power is exclusive, and that the states cannot directly regulate interstate and, foreign commerce *as such* except to the extent that Congress has granted permission. *Brown* v. *Maryland*, 25 US 419 (1827); *Gibbons* v.

Ogden, 22 US 1 (1824); *see H. P. Hood & Sons, Inc.* v. *DuMond*, 336 US 525 (1949) (relating to the requirement of specific congressional authorization for state action). If a state statute is for a legitimate state end such as the enhancement of public health, safety, security, or conservation, and it does not unduly restrict interstate commerce (a balancing test), it is valid. *See, e.g., Huron Portland Cement Co.* v. *The City of Detroit*, 362 US 440 (1960); *Breard* v. *Alexandria*, 341 US 622 (1951); *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 US 179 (1950); *Mintz* v. *Baldwin*, 289 US 346 (1933); *Bradley* v. *Public Utilities Commission*, 289 US 92 (1933).

However, this analysis first requires the establishment of a legitimate state interest in the regulation. If such an interest does not exist, the state regulation is invalid, and attempts by states to interfere with interstate commerce for economic reasons are virtually *per se* invalid. *City of Philadelphia* v. *New Jersey*, 437 US 617 (1978).

In a closely analogous case, a Louisiana statute made it unlawful to export shrimp caught in Louisiana waters without the heads and hulls removed, *i.e.*, "primarily processed." The real purpose, held the court, was to protect Louisiana processors, but even given the stated statutory purpose to satisfy local demands:

> ". . . A State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State." *Foster-Fountain Packing Co.* v. *Haydel*, 278 US 1, 10 (1928). (Citations omitted.)

The *Foster-Fountain* case can be distinguished on two grounds. First, ORS 526.805 deals not with privately-owned articles of trade but with state-owned timber. The "proprietary" exception to the commerce clause inhibitions on the states will be discussed immediately below. Secondly, ORS 526.805

affects *foreign* commerce, rather than interstate commerce. As stated in *Reeves, Inc.* v. *Stake*, 447 US 429, 438, n 9 (1980):

> ". . . We note, however, that *Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged.* See *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979)." (Emphasis added.)

The statutory prohibition is justified only if the state's ownership of the timber permits an exception to the general rule. This "proprietary" exception is delineated in two recent United States Supreme Court cases.

In *Hughes* v. *Alexandria Scrap Corp.*, 426 US 794 (1976), the court dealt with a Maryland statutory scheme designed to rid its streets and highways of inoperable junk cars. The state paid a bounty for their destruction. Maryland scrap dealers were required to submit only an indemnity agreement in lieu of evidence of title to the scrapped vehicle, but out-of-state dealers were required to submit evidence of title which, as a practical matter, meant a cost to them of about $10 per vehicle. Thus the $18 bounty received by Maryland scrap dealers was only an $8 bounty for out-of-state dealers. The natural result was to discourage transportation of hulks out of the state for scrapping, amounting to a burden on interstate commerce.

The court sustained the statute. Maryland, it said, was in effect a purchaser of the junk cars, and as such it could purchase from whomever it chose, and could favor Maryland dealers over out-of-state dealers. *The court made a substantial point of the fact that there was no prohibition on removal of junk cars from the state.*

> ". . . Maryland has not sought to prohibit the flow of hulks, or to regulate the conditions under which it may occur. Instead, it has entered into the market itself to bid up their price. . . ." *Hughes* v. *Alexandria Scrap Corp.*, *supra*, 426 US at 806.

In *Reeves, Inc.* v. *Stake*, *supra*, 447 US 429, a 5-4 majority of the court upheld the right of the state of South Dakota to sell cement produced by a state-owned plant only to residents,

during a period when demand exceeded supply. This policy clearly burdened interstate commerce. As proprietor of a cement manufacturing plant, the state had the right to limit the benefits of the investment of its citizens to those same citizens.

The majority emphasized the state's investment in manufacturing facilities, and very pointedly stated: "Cement is not a natural resource, like coal, *timber*, wild game, or minerals." *Id.* at 443. It went on to point out that South Dakota did not seek to limit sales of limestone—necessary to manufacture cement—to South Dakota residents. Nor did South Dakota prohibit resident purchasers of cement from using that cement out of the state, or from immediately reselling to out-of-state purchasers.

Neither case, in our opinion, is of any support to validity of the Oregon statute. For purposes of this letter opinion, we point out only that neither Maryland nor South Dakota prohibited the flow of the commodity out of the state; Oregon does. South Dakota manufactured cement; Oregon's law deals with precisely one of the natural resources, timber, which the majority in *Reeves, Inc.* v. *Stake, supra*, emphasized was *not* involved in the South Dakota case. Considering the 5-4 split in that case, the absence of the factors (not all of which we have mentioned) relied on by the majority and the presence of countervailing factors which were absent in that case, it seems highly probable that the court would reach a different conclusion in this case.

In 30 Op Atty Gen 186 (1961) the Attorney General held that the measure which became ORS 526.805 to 526.835 was unconstitutional. HB 1663, enacted as Or Laws 1961, ch 700. The limited exception allowing export permits in the absence of a market has since been repealed, as noted above, and the prohibition is now unequivocal. Notwithstanding the presumption of constitutionality to which the measure became entitled when it was enacted, we are unable to find any real justification for a different result.

At the start of this opinion we referred to *South-Central Timber Development, Inc.* v. *La Resche, supra,* 511 F Supp 139. In that case the district court held that an Alaskan statute requiring primary manufacture in the state of timber sold by the state was an unconstitutional infringement upon interstate and foreign commerce. Oregon, in contrast, permits primary manufacture in other states—it is only foreign export for primary manufacture that is prohibited. This distinction does make a difference, in our opinion—if protection of a state's lumber manufacturing industry is not a valid basis for prohibiting export to other states or countries, protection of American lumber manufacturing industry is certainly beyond Oregon's power. It is reserved by the Commerce Clause to the United States.

We must point out that Oregon's statute is not unique. We have noted the Alaskan restrictions, adopted by regulation as authorized by Alas Acts Annot sec 76.130. Section 4650.1 of the California Public Resources Code forbids foreign export of unprocessed state timber. Idaho Code sec 58-403 requires primary manufacture within the state. If Alaska's statute falls, so too, it seems inevitable, will the California, Idaho, and Oregon provisions.

It is assertedly more significant that these state statutes forbidding foreign export merely carry out federal policy. In 1968, the Secretaries of Agriculture and Interior jointly imposed quotas on export of unprocessed logs, ". . . to maintain a viable domestic wood processing industry capable of processing the sustained yield of timber from the selected areas."[1] This policy was then legislated by Congress in the Morse Amendment to the Foreign Assistance Act of 1968, 82 Stat. 966. Further restrictions were imposed in 1974 as a rider to PL

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[1] This question, and most of the following information, is taken from USDA Forest Service General Technical Report PNW-63 (1978), "Log Export Restrictions of the Western States and British Columbia."

93-120, sec 301, the Department of Interior Appropriations Act, and the same rider was attached to Interior appropriations acts in each succeeding year through 1981. PL 96-514, sec 302; 94 Stat 2983. The Forest Service and Bureau of Land Management have equivalent regulations. 36 CFR sec 223.10 (1981); 43 CFR secs 5400, 5420, 5440 (1980).

It is strongly argued that by thus carrying out federal policy, the Oregon statute does not operate to ". . . impair federal uniformity in an area where federal uniformity is essential." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 US 434, 448 (1979). This misses the point that Congress has authority to regulate foreign commerce; Oregon does not, except to the extent that Congress grants permission. The same argument (with respect to interstate commerce) was made and expressly rejected in *H. P. Hood & Sons, Inc.* v. *DuMond*, *supra*, 336 US 525. There an action by an administrative agency of the State of New York which burdened interstate commerce was defended because it "coincides with, supplements and is part of the federal regulatory scheme." *Id.* at 540. The court went on to say:

> ". . . We have no doubt that Congress in the national interest could prohibit or curtail shipments of milk in interstate commerce, unless and until local demands are met. Nor do we know of any reason why Congress may not, if it deems it in the national interest, authorize the states to place similar restraints on movement of articles of commerce. . . . It is, of course, a quite different thing if Congress through its agents finds such restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity.
>
> ". . . .
>
> "Since the statute as applied violates the Commerce Clause *and is not authorized by federal legislation* pursuant to that Clause, it cannot stand . . . ." Id. at 542-545. (Emphasis added.)

Congress may and has acted to restrict the foreign export of unprocessed logs removed from federal lands. Oregon, we

believe, may not do so with respect to its own lands, and Congress has not given it permission to do so.

We do not, for purposes of this letter opinion, go on to consider your additional questions relating to proposed legislation which would further implement the ban on exports by a "no substitution" clause or by variations of such a clause. If ORS 528.805 falls, these too would fall with it. If ORS 528.805 is valid, such provisions may well also be valid, but substantial additional analysis would be necessary to reach a conclusion.

We touch upon two further matters. In our opinion No. 8097 issued February 11, 1982, we held that the State Land Board has ultimate authority to manage the constitutional Common School Fund lands, and that the legislature cannot deprive it of this authority. *If* ORS 526.805 and 526.835 are valid, they are valid because the state owns the logs involved. As applied to constitutional Common School Fund lands, the legislature does *not* have authority to act as owner. The State Land Board has that authority. If applied to those lands, and if so doing would impair the ability of the State Land Board to sell timber on the most advantageous terms, ORS 526.805 and 526.835 would impair the authority of the Land Board to manage. We therefore unequivocally state that these statutes cannot constitutionally be applied to sale of logs from constitutional Common School Fund lands, if the Land Board finds that sale for export would be a proper management decision.

In a letter opinion OP-5332 dated February 12, 1982, we have just informed the State Forester that no export permit can be issued under former ORS 526.815 for export of logs cut under a contract predating repeal of that statute. If as we believe in all probability ORS 526.805 is unconstitutional, the purchaser is free to export the logs without a permit. Whether in light of this opinion it is willing to do so is a matter for that

purchaser to decide on the basis of the advice of its own counsel.

Very truly yours,

/s/ Dave Frohnmayer
DAVE FROHNMAYER
Attorney General

DF:JAR:mc

APPENDIX G

ALASKA GOVERNOR'S POLICY STATEMENT

POLICY STATEMENT ON PRIMARY MANUFACTURE

Section 76.130, "Timber Sale Regulations"

Cants may be manufactured from all species for export and shall be considered to have received primary manufacture when sawed up to a maximum thickness of 12 inches and may be of any width. Timber cut thicker than 12 inches must be squared on four sides along their entire length with allowances for one-third of each dimension (thickness and width) allowed in wane.

Timber processing wastes from west of 141° Longitude when manufactured into chips are considered to have received primary manufacture and may be exported. Timber processing wastes from east of 141° Longitude in Southeast Alaska when manufactured into chips are considered to have received primary manufacture and export may be permissive only on action of the Commissioner. Timber processing wastes is hereby defined as all timber, mill residue, logging residue, or other material not presently being utilized or in demand for higher-valued products.

With the advance approval of the Commissioner, limited quantities of all species, excluding spruce and hemlock, may be exported in the form of round logs for experimental purposes only; e.g., to introduce a new product to market. Round logs may not be exported as a marketable commodity.

The above statement is intended to clarify and/or define Section 76.130 of the "Timber Sale Regulations" and supersedes all previous policy statements and/or resolutions.

/s/ William A. Egan
WILLIAM A. EGAN
Governor of Alaska

DATE May 7, 1974

APPENDIX H

STATISTICAL ABSTRACT OF THE UNITED STATES

Section 25

FORESTS and
FOREST PRODUCTS

This section presents data on the area, ownership, and timber resource of commercial timberland; forestry statistics covering the National Forests and Forest Service cooperative programs; product data for lumber, pulpwood, woodpulp, paper and paperboard, turpentine, and rosin, and similar data.

The principal sources of these data are *An Analysis of the Timber Situation in the United States, 1952-2030, Appendix 3; U.S. Timber Production, Trade, Consumption, and Price Statistics, 1950-80; National Forest System;* and *Wildfire Statistics*, issued annually by the Forest Service of the Department of Agriculture, *Agricultural Statistics* issued by the Department of Agriculture; and reports of the census of manufacturers (taken every five years) and the monthly and annual *Current Industrial Reports*, issued by the Bureau of the Census. Additional information is published in the *Annual Report* of the National Forest Reservation Commission; the monthly and annual *Naval Stores* of the Department of Agriculture; the monthly *Survey of Current Business* of the Bureau of Economic Analysis; and the annual *Wood Pulp Statistics* and *The Statistics of Paper and Paperboard* of the American Paper Institute, New York, N.Y.

The Bureau of the Census also collects data on foreign trade of forest products. The Bureau of Labor Statistics publishes monthly and annually statistics of producer prices for lumber.

The completeness and reliability of statistics on forests and forest products vary considerably. The data for forest land area and stand volumes are much more reliable for areas which have been recently surveyed than for those for which only estimates are available. Estimates of fire damage or causes of fires for Federal lands are considered much better than those

for private lands. In general, more data are available for lumber and other manufactured products such as veneer and plywood, etc., than for the primary forest products such as poles and piling and fuelwood.

Historical statistics.—Tabular headnotes provide cross-references, where applicable, to *Historical Statistics of the United States, Colonial Times to 1970.* See Appendix I.

No. 1257. Forest Land Area, Commercial Area Ownership, and Volume of Sawtimber and Growing Stock, by States: 1977 (Jan. 1)

State	Total forest land (1,000 acres)	Commercial timberland, ownership[1] (1,000 acres): Total	Federally owned or managed[2]	State, county, municipal	Private	Sawtimber net volume[3]: Total (mil. bd. ft.)	Softwood (mil. bd. ft.)	Growing stock, net volume[4]: Total (mil. cu. ft.)	Softwood (mil. cu. ft.)
U.S.	736,558	482,486	106,472	30,249	345,764	2,570,940	1,985,409	710,960	455,779
North	177,662	166,141	11,964	18,549	135,628	389,021	99,894	173,145	44,574
New Eng	32,461	30,966	779	1,317	28,869	79,507	43,689	41,848	23,383
Conn	1,861	1,806	2	144	1,659	3,870	1,305	2,862	425
Maine	17,718	16,864	73	468	16,323	38,118	25,232	22,604	16,060
Mass	2,952	2,798	10	356	2,432	7,868	4,168	3,693	1,436
N.H.	5,014	4,692	472	108	4,112	14,584	8,607	7,286	3,538
R.I.	404	385	-	32	353	667	260	412	108
Vt	4,512	4,430	213	209	4,008	10,391	4,188	4,880	1,826
Mid Atl	50,688	46,415	1,595	4,684	40,356	101,969	17,094	56,451	7,688
Del	392	384	1	13	370	1,393	409	625	189
Md	2,653	2,523	25	218	2,280	6,167	1,728	3,462	793
N.J.	1,928	1,857	28	291	1,538	3,127	575	1,524	251
N.Y.	17,218	14,243	58	835	13,351	26,068	7,771	13,258	3,523
Pa	16,826	15,924	503	2,968	12,453	34,251	3,714	23,403	1,779
W. Va	11,669	11,484	892	229	10,363	29,934	2,901	14,153	1,092
Lake	51,844	47,579	6,730	11,886	28,944	97,766	30,984	44,517	11,801
Mich	19,270	18,778	2,472	3,947	12,358	42,441	13,205	19,214	8,081
Minn	16,709	13,685	2,336	4,992	6,367	24,607	8,531	11,454	3,477
N. Dak	422	405	114	10	281	474	-	257	(Z)
S. Dak. (east)	335	223	74	3	146	448	66	134	23
Wis	14,908	14,478	1,753	2,934	9,792	29,797	9,183	13,457	3,340
Central	42,872	41,163	2,949	783	37,431	83,768	4,825	39,219	1,684
Ill	3,810	3,692	268	11	3,413	7,094	30	2,180	24
Ind	3,943	3,815	239	171	3,405	10,967	255	3,798	67
Iowa	1,561	1,460	57	58	1,346	3,418	14	1,036	6
Kans	1,344	1,187	27	10	1,151	2,020	1	364	1
Ky	12,161	11,902	818	77	11,007	28,941	2,091	11,969	816
Mo	12,876	12,298	1,313	219	10,757	15,270	1,262	8,022	382
Nebr	1,029	788	67	12	710	1,737	510	442	118
Ohio	6,147	6,029	150	237	5,642	14,341	433	4,329	128
South	206,175	188,046	14,466	3,245	170,315	614,709	341,023	203,089	87,138
So. Atl	48,718	47,677	3,087	883	42,807	171,461	74,317	59,968	23,333
N.C	20,043	19,562	1,365	399	17,799	76,794	35,375	26,131	10,742
S.C	12,249	12,176	882	233	11,061	40,837	22,809	14,201	7,079
Va	16,417	15,939	1,670	252	14,017	53,771	16,134	19,657	5,512
E. Gulf	42,296	40,143	3,040	639	36,466	112,479	74,079	40,134	34,469
Fla	17,040	15,330	1,623	492	13,215	31,950	21,129	11,733	7,525
Ga	25,256	24,813	1,417	128	23,268	80,529	52,949	28,402	16,880
Ctr. Gulf	51,237	50,867	2,936	1,916	46,767	162,261	87,903	51,677	23,666
Ala	21,361	21,333	803	209	20,324	69,306	46,509	22,240	12,329
Miss	16,716	16,504	1,216	461	14,828	60,642	35,370	17,234	8,929
Tenn	13,161	12,820	919	346	11,555	32,313	6,024	12,004	2,267
W. Gulf	64,633	49,869	4,614	736	44,229	168,479	104,734	49,918	25,643
Ark	18,282	18,207	2,718	256	15,233	48,969	29,462	17,146	7,080
La	14,886	14,527	884	308	13,525	63,418	38,648	17,431	9,417
Okla	8,513	4,323	483	105	3,735	6,067	3,676	2,062	1,010
Tex	23,279	12,513	740	96	11,717	50,025	38,038	13,272	8,356
West	352,601	126,399	79,023	8,455	40,821	1,566,211	1,547,862	335,814	314,669
Pac. NW	172,136	53,583	29,852	5,630	18,101	950,326	911,897	186,139	173,156
Alaska	119,145	11,150	8,423	2,438	289	188,858	184,405	43,073	40,620
Oreg	29,810	24,211	14,201	926	9,084	431,172	414,186	79,564	74,735
Wash	23,181	17,922	6,929	2,266	8,728	330,296	313,300	63,503	57,800
Pac. SW	42,138	17,251	8,581	548	8,122	264,716	255,611	49,879	45,879
Calif	40,152	16,303	8,569	106	7,628	263,669	255,594	49,666	45,875
Hawaii	1,986	948	12	442	494	1,047	17	202	4
No. Rocky Mt	56,682	33,478	23,227	1,685	8,567	269,546	257,867	68,699	67,942
Idaho	21,727	13,541	9,640	880	3,021	139,618	130,060	31,884	31,062
Mont	22,356	14,369	9,260	534	4,565	97,334	88,238	27,877	27,081
S. Dak. (west)	1,367	1,244	959	70	215	5,615	5,507	1,643	1,627
Wyo	10,029	4,334	3,389	111	866	27,079	26,683	7,195	6,993
So. Rocky Mt	63,866	24,207	17,063	682	6,461	129,624	113,012	31,110	28,669
Ariz	18,494	3,886	3,686	34	166	22,711	22,063	4,962	4,763
Colo	22,271	11,316	7,982	224	3,110	54,941	50,684	15,026	12,624
Nev	7,683	134	61	5	68	1,399	1,393	352	349
N. Mex	18,060	5,536	3,438	171	1,927	35,919	34,346	6,398	5,759
Utah	15,357	3,405	2,905	239	261	15,866	14,307	4,440	3,382

- Represents zero. Z Less than 500,000 cubic feet. [1] Commercial timberland is forest land which is producing or is capable of producing crops of industrial wood and not withdrawn from timber utilization by statute or administrative regulation. Areas qualifying as commercial timberland have the capability of producing in excess of 20 cubic feet per acre per year of industrial wood in natural stands. Currently inaccessible and inoperable areas are included. [2] Includes Indian lands. [3] Net volume of the saw log portion of live sawtimber trees in board feet, International ¼-inch log rule. [4] Net volume in cubic feet of live sawtimber and poletimber trees from stump to a minimum 4-inch top (of central stem) outside bark or to the point where the central stem breaks into limbs.

Source: U.S. Forest Service, *An Analysis of the Timber Situation in the United States, 1952-2030*, Appendix 3.

Section 26

Fisheries

This section presents statistics on commercial fishing and the fish processing industry. The principal sources of these data are *Fishery Statistics of the United States*, and *Fisheries of the United States*, both issued annually by the National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA)

The NFMS collects and disseminates data on commercial landings of fish and shellfish, freezings and holdings of fishery products, fish meal and oil production, and foreign trade in fishery products. Quarterly data are published on U.S. output of fish sticks, fish portions, and breaded shrimp. Annual reports include quantity and value of commercial landings of fish and shellfish (by species, region, State, and type of fishing gear), disposition of landings, number of fishermen, and number and kinds of fishing vessels and fishing gear. Reports for the fish-processing industry include annual output of canned, packaged, and industrial products and, for the wholesaling and fish processing establishments, annual and seasonal employment, and number of firms, by product and State. Annual data are published on foreign trade in fishery products and per capita consumption of edible fishery products.

The Magnuson Fishery Conservation and Management Act of 1976 established a Fisheries Conservation Zone (FCZ) which gives the Federal Government exclusive authority over domestic and foreign fisheries within 200 nautical miles of U.S. shores and over certain living marine resources beyond the FCZ. Within the FCZ, the total allowable level of foreign fishing, if any, is that portion of the "optimum yield" not harvested by U.S. vessels. Adjustments in the "optimum yield" level may occur periodically. For details, see *Fisheries of the United States, 1980*. The NMFS collects and disseminates data on catches by foreign fishing vessels in the FCZ.

The catch value as presented in various tables is "ex-vessel," or value at the dock. It represents the price received by fishermen and vessel owners for fish, shell-fish, etc.

Historical statistics.—Tabular headnotes provide cross-references, where applicable, to *Historical Statistics of the United States, Colonial Times to 1970.* See Appendix I.

No. 1279. Fisheries—Fishermen and Craft, 1976, and Catch, 1978 and 1979, by Areas

(See *Historical Statistics, Colonial Times to 1970*, series L 236–253, for data on quantity and ex-vessel value of catch)

Area	1978 [1]			1978		1979					
	Fishermen (1,000)	Fishing vessels	Fishing boats [2] (1,000)	Total catch (mil. lb.)	Value (mil. dol.)	Catch (mil. lb.)			Value of catch (mil. dol.)		
						Total	Finfish	Shellfish	Total	Finfish	Shellfish
United States	[3] 173.6	[3] 16,875	[3] 85.9	6,029	1,854	6,267	5,132	1,135	2,234	1,114	1,120
New England States	30.5	855	15.6	881	256	709	618	91	302	144	158
Middle Atlantic States	17.7	580	12.5	201	79	229	167	61	82	26	56
Chesapeake Bay States	25.0	1,939	15.4	589	94	639	513	126	122	37	85
South Atlantic States	10.6	1,421	6.0	399	86	488	398	90	145	54	91
Gulf States	29.1	5,193	10.0	2,267	473	2,129	1,849	280	530	107	423
Pacific Coast States	48.4	7,193	13.8	1,741	821	1,925	1,441	484	1,008	711	295
Great Lakes States	1.1	184	.5	68	10	49	49	-	11	11	-
Mississippi River States	11.7	-	11.0	58	13	[4] 86	83	3	15	14	1
Hawaii	2.7	101	1.3	14	12	14	14	(Z)	11	10	1

- Represents zero. Z Less than 500,000 pounds or $500,000. [1] As of Dec. 31. [2] Refers to craft having capacity of less than 5 net tons. [3] Exclusive of duplication among regions. Computation of area amounts will not equal U.S. total. [4] Mississippi River and other areas.

Source: U.S. National Oceanic and Atmospheric Administration, *Fishery Statistics of the United States*, annual, and *Fisheries of the United States*, annual

Section 27

Mining and Mineral Products

This section presents data relating to mineral industries and their products, general summary measures of production and employment, and more detailed data on production, prices, imports and exports, consumption, and distribution for specific industries and products. Data on mining and mineral products may also be found in sections 29 and 33 of this *Abstract;* data on mining employment may be found in section 13.

"Mining" comprises the extraction of minerals occurring naturally (coal, ores, crude petroleum, natural gas) and quarrying, well operation, milling, refining and processing and other preparation customarily done at the mine or well site or as a part of extraction activity. (Mineral preparation plants are usually operated together with mines or quarries.) Exploration for minerals is included as is the development of mineral properties.

The principal governmental sources of these data are the three-volume *Minerals Yearbook*, published by the Bureau of Mines, Department of the Interior, and various monthly and annual publications of the Energy Information Administration, Department of Energy. In addition, the Bureau of the Census conducts a census of mineral industries every 5 years. Non-government sources include the *Annual Statistical Report* of the American Iron and Steel Institute, Washington, D.C.; *Metals Week* and the monthly *Engineering and Mining Journal*, issued by McGraw-Hill Publishing Co., New York; *The Iron Age*, issued weekly by the Chilton Co., Philadelphia; and the *Joint Association Survey of the U.S. Oil and Gas Industry*, conducted by the American Petroleum Institute, Independent Petroleum Association of America, and Mid-Continent Oil and Gas Association.

Mineral statistics, with principal emphasis on commodity detail, have been collected by the Geological Survey or by the

Bureau of Mines since 1880. Current data in Bureau of Mines publications include quantity and value of nonfuel minerals produced, sold or used by producers, or shipped; quantity of minerals stocked; crude materials treated and prepared minerals recovered; and consumption of mineral raw materials. The U.S. Mine Safety and Health Administration also collects and publishes data on workhours, employment, and accidents and injuries in the mineral industries, except petroleum and natural gas. In October 1977, fuel data collection activities of the Bureau of Mines were transferred to the Energy Information Administration.

Censuses of mineral industries have been conducted by the Bureau of the Census at various intervals since 1840. Beginning with the 1967 census, legislation provides for a census to be conducted every fifth year for years ending in "2" and "7." The censuses provide, for the various types of mineral establishments, information on operating costs, capital expenditures, labor, equipment, and energy requirements in relation to their value of shipments and other receipts. Commodity statistics on many manufactured mineral products are also collected by the Bureau at monthly, quarterly, or annual intervals and issued in its *Current Industrial Reports* series. Included in this series, beginning in 1973, is the *Annual Survey of Oil and Gas*.

In general, figures shown in the individual commodity tables include data for outlying areas, and may therefore not agree with summary table 1308. Except for crude petroleum and refined products, the export and import figures include foreign trade passing through the customs districts of United States and Puerto Rico, but exclude shipments between U.S. territories and the customs districts.

Historical statistics.—Tabular headnotes provide cross-references, where applicable, to ***Historical Statistics of the United States, Colonial Times to 1970.*** **See Appendix I.**

No. 1308. Mineral Production and Value, 1970 to 1979,

[Data represent production as measured by mine shipments, mine sales, or marketable production [illegible] 13-37, for [illegible]

	Mineral	Production quantity: Unit	1970	1975	1976	1977	1978	1979
1	**Total mineral production**	(X)	(X)	(X)	(X)	(X)	(X)	(X)
2	**Mineral fuels**	(X)	(X)	(X)	(X)	(X)	(X)	(X)
3	Coal: Bituminous and lignite	Mil. sh. ton	603	648	679	691	665	776
4	Pennsylvania anthracite	Mil. sh. ton	10	6	6	6	5	5
5	Natural gas (wet)	Bil. cu. ft.	21,921	20,108	19,952	20,025	19,974	20,471
6	Petroleum (crude)	Mil. bbl.[1]	3,517	3,057	2,976	3,009	3,178	3,121
7	Uranium[2]	Mil. lb.	23.1	23.2	25.5	29.9	37.0	37.5
8	**Nonmetallic minerals**	(X)	(X)	(X)	(X)	(X)	(X)	(X)
9	Abrasive stone[3]	Sh. ton	3,055	2,953	2,695	2,200	487	1,944
10	Asbestos	1,000 sh. ton	125	99	115	102	103	103
11	Asphalt and related bitumens (native)[4]	1,000 sh. ton	1,861	1,902	2,012	1,237	1,687	1,614
12	Barite	1,000 sh. ton	854	1,318	1,234	1,494	2,112	1,937
13	Boron minerals	1,000 sh. ton	1,041	1,172	1,246	1,469	1,554	1,590
14	Bromine	Mil. lb.	350	407	460	434	447	503
15	Calcium chloride	1,000 sh. ton	633	884	649	710	773	720
16	Carbon dioxide, natural (estimate)	Mil. cu. ft.	1,110	1,070	1,257	1,617	2,015	2,029
17	Cement: Portland	Mil. sh. ton	73.2	66.6	71.2	76.3	80.0	79.0
18	Masonry	Mil. sh. ton	3.0	2.9	3.3	3.6	4.1	3.7
19	Clays	Mil. sh. ton	54.9	48.0	52.4	53.2	56.9	54.7
20	Dolomite	1,000 sh. ton	598	573	631	646	651	717
21	Emery	1,000 sh. ton	(D)	3.5	(D)	(D)	(D)	(D)
22	Feldspar	1,000 sh. ton	726	670	740	734	736	740
23	Fluorspar	1,000 sh. ton	269	140	186	169	129	108
24	Garnet (abrasive)	1,000 sh. ton	16.6	17.2	24.6	20.0	25.7	21.2
25	Gem stones (estimate)	(X)	(NA)	(NA)	(NA)	(NA)	(NA)	(NA)
26	Gypsum	Mil. sh. ton	9.4	9.8	12.0	13.4	14.9	14.6
27	Helium[5]	Mil. cu. ft.	4,600	1,079	1,239	1,494	1,550	1,673
28	Lime	Mil. sh. ton	19.7	19.1	20.2	19.9	20.4	20.8
29	Magnesium compounds[7]	1,000 sh. ton	709	(D)	(D)	830	(D)	(D)
30	Mica: Scrap	1,000 sh. ton	119	135	141	176	162	175
31	Sheet	1,000 lb.	-	5.0	5.0	(D)	(D)	-
32	Peat	1,000 sh. ton	526	746	731	729	750	796
33	Perlite	1,000 sh. ton	456	512	553	587	641	680
34	Phosphate rock	Mil. sh. ton	38.7	48.8	49.2	52.1	55.2	56.6
35	Potash[8]	1,000 sh. ton	2,729	2,094	2,501	2,461	2,543	2,632
36	Pumice	1,000 sh. ton	3,036	3,882	4,134	4,009	4,757	4,414
37	Pyrites	1,000 lg. ton	(D)	625	750	475	786	1,032
38	Salt (common)	Mil. sh. ton	45.9	41.0	44.2	43.4	42.9	45.6
39	Sand and gravel	Mil. sh. ton	944	789	865	929	996	979
40	Sodium carbonate (natural)	1,000 sh. ton	2,686	4,329	5,216	6,229	6,750	(D)
41	Sodium sulfate (natural)	1,000 sh. ton	602	687	663	626	605	633
42	Stone[9]	Mil. sh. ton	869	901	932	955	1,051	1,096
43	Sulfur: Frasch mines	1,000 lg. ton	8,504	8,077	5,860	5,935	5,646	7,334
44	Talc, soapstone, pyrophyllite	1,000 sh. ton	1,026	965	1,082	1,205	1,284	1,453
45	Tripoli	1,000 sh. ton	68	81	124	126	119	116
46	Vermiculite	1,000 sh. ton	285	330	304	368	337	340
47	Nonmetallic minerals, undistributed[10]	(X)	(X)	(X)	(X)	(X)	(X)	(X)
48	**Metals**	(X)	(X)	(X)	(X)	(X)	(X)	(X)
49	Antimony ore and concentrate	Sh. ton[11]	1,130	898	263	610	(D)	(D)
50	Bauxite	1,000 lg. ton[12]	2,082	1,772	1,958	1,881	1,643	1,762
51	Copper[2]	1,000 sh. ton	1,720	1,413	1,606	1,504	1,486	1,591
52	Gold[2]	1,000 fine oz.	1,743	1,052	1,049	1,100	999	920
53	Iron ore, usable[13]	Mil. lg. ton[14]	87.2	75.7	77.1	54.1	82.2	86.2
54	Lead[2]	1,000 sh. ton	573	621	610	597	584	579
55	Manganiferous ore[15]	1,000 sh. ton[16]	269	150	257	216	312	241
56	Mercury	76 lb. flask	27,296	7,366	23,133	28,244	24,163	29,519
57	Molybdenum[2]	Mil. lb.	110	105	115	135	131	144
58	Nickel[2]	1,000 sh. ton	15.9	17.0	16.5	14.3	13.5	15.1
59	Silver[2]	Mil. fine oz.	45.0	34.9	34.3	38.2	39.4	38.1
60	Titanium concentrate, ilmenite[2]	1,000 sh. ton[16]	821	702	618	640	661	640
61	Tungsten ore and concentrate	1,000 lb.[16]	9,212	5,490	5,880	6,000	6,001	[illegible]
62	Vanadium[2]	Sh. ton	5,819	4,745	7,276	8,850	4,272	[illegible]
63	Zinc[2]	1,000 sh. ton	534	469	489	450	329	[illegible]
64	Metals, undistributed[10]	(X)	(X)	(X)	(X)	(X)	(X)	(X)

- Represents zero. D Withheld to avoid disclosing individual company data. NA Not available. X Not applicable. [1] 42 gal. bbl. [2] [illegible] [3] [illegible] stones, and [illegible]. [4] [illegible] [5] [illegible] [6] Crude and [illegible]. [7] [illegible] [8] [illegible] [9] [illegible]

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AND PRINCIPAL PRODUCING STATES, 1979

[including consumption by producers]. See *Historical Statistics, Colonial Times to 1970*, series M [illegible] selected values]

PRODUCTION VALUE (mil. dol.)						Principal producing States ranked by quantity, 1979	
1970	1975	1976	1977	1978	1979		
38,513.3	69,386.3	66,920.8	73,050.3	81,316.8	106,858.7	(x).	1
18,948.9	44,877.4	49,612.6	56,115.3	62,083.3	82,888.6	(x).	2
3,772.7	12,472.5	13,169.5	13,705.2	14,486.5	18,243.0	Ky., W. Va., Pa.	3
107.3	200.1	211.3	204.3	117.8	183.7	Pa.	4
3,745.7	8,945.1	11,571.8	15,825.0	18,076.5	24,115.1	La., Tex., Okla., N. Mex.	5
11,173.7	23,118.1	24,229.5	25,790.7	28,603.9	39,453.4	Tex., Alaska, La., Calif.	6
149.5	243.8	410.5	590.1	798.8	893.4	N. Mex., Wyo., Tex.	7
5,785.8	9,494.0	10,616.8	11,762.8	13,525.8	15,449.8	(x).	8
.8	1.1	1.4	3.2	1.3	1.7	Minn., Wis., Ark.	9
10.7	14.2	23.7	25.3	29.0	29.9	Calif., Vt., Ariz.	10
8.8	17.8	17.6	13.9	19.3	25.6	Tex., Utah, Ala., Mo.	11
12.8	21.2	29.7	30.3	44.0	48.0	Nev., Mo., Ga.	12
88.8	158.8	184.9	239.2	279.8	310.2	Calif.	13
90.6	113.1	112.3	99.7	100.0	117.0	Ark. and Mich.	14
18.2	29.0	32.9	46.0	53.9	61.9	Mich. and Calif.	15
.2	.3	.3	.4	2.8	3.2	N. Mex., Colo., Utah, Calif.	16
1,288.7	2,015.6	2,330.4	2,727.6	3,239.6	3,650.4	Calif., Tex., Pa., Mich.	17
67.5	111.8	139.6	169.1	208.6	204.8		18
287.9	424.6	529.7	579.2	717.3	846.1	Ga., Tex., Wyo., N.C.	19
32.6	45.8	55.0	63.9	72.4	90.3	Calif., Nev., Wash., Oreg.	20
(*)	(*)	(*)	(*)	(*)	(*)	N.Y.	21
9.6	11.7	17.5	17.2	18.2	21.5	N.C., Conn., Ga., Okla.	22
13.9	10.9	17.9	18.5	13.3	12.2	Ill., Nev., Tex., Ariz.	23
1.9	1.7	2.7	2.2	2.3	2.0	N.Y., Idaho, Maine	24
2.4	13.9	8.9	9.9	8.9	8.2	NA	25
35.1	44.7	59.8	74.5	82.7	89.9	Mich., Tex., Iowa, Calif.	26
64.2	22.9	25.9	30.7	31.9	34.2	Kans., Tex., Okla.	27
86.2	523.6	609.0	668.5	749.7	862.5	Ohio, Pa., Mo., Tex.	28
62.4	(*)	(*)	127.7	(*)	(*)	Mich., Calif., N.J., Fla.	29
2.5	5.2	5.8	7.3	8.0	7.8	N.C., S.C., N. Mex., Ala.	30
-	(2)	(2)	(*)	(*)	-	(x)	31
6.0	12.3	12.1	12.5	13.0	15.5	Mich., Fla., Ill., Ind.	32
.8	7.3	9.4	10.8	13.7	18.4	N. Mex., Calif., Ariz., Idaho	33
203.2	1,122.2	949.4	821.7	829.8	1,045.7	Fla., Idaho, N.C., Tenn.	34
98.1	223.1	210.8	208.9	226.5	279.2	N. Mex., Utah, Calif.	35
4.7	11.2	10.5	12.0	14.5	16.0	Arizona, Calif., Oreg., Nev.	36
(*)	4.8	8.2	7.0	12.3	17.1	Tenn., Colo., Ariz.	37
304.6	368.1	431.0	451.6	489.3	538.4	La., Tex., N.Y., Ohio	38
1,115.7	1,340.3	1,774.0	2,029.0	2,302.0	2,427.0	Calif., Tex., Alaska, Mich.	39
98.3	182.6	259.3	337.5	371.3	(*)	Wyo. and Calif.	40
10.9	27.7	32.7	29.3	27.8	29.7	Calif., Tex., Utah	41
1,489.6	2,120.3	2,221.0	2,456.9	2,885.7	3,309.0	Pa., Tex., Ill., Ga.	42
151.8	304.0	300.0	294.7	279.9	449.4	Tex. and La.	43
7.8	8.9	9.9	13.1	15.8	20.4	Vt., Mont., N.Y., Tex.	44
.5	.6	.8	.8	.8	6.3	Ill., Okla., Ark., Pa.	45
6.5	13.6	14.0	18.6	19.7	22.0	Mont., S.C., Va.	46
34.4	157.2	169.5	98.0	222.6	740.5	(x)	47
3,778.5	4,914.9	5,693.2	5,233.0	6,308.5	8,519.1	(x)	48
(10)	2.1	.6	1.3	(10)	(10)	Idaho and Mont.	49
30.1	25.1	26.6	28.0	23.2	34.9	Ark., Ala., Ga.	50
1,984.5	1,814.8	2,229.8	2,009.3	1,990.3	2,955.7	Ariz., Utah, N. Mex., Mont.	51
63.4	169.9	131.3	163.2	183.3	298.3	Utah, S. Dak., Nev., Ariz.	52
941.7	1,620.6	1,871.0	1,423.0	2,401.0	2,814.0	Minn., Mich., Calif., Wyo.	53
178.6	287.2	281.6	363.8	393.5	609.9	Mo., Idaho, Colo., Va.	54
(10)	1.4	2.3	2.2	3.1	2.9	Minn., N. Mex., S.C.	55
11.1	1.2	2.8	3.8	3.7	8.3	Nev. and Calif.	56
190.1	259.3	333.6	490.4	607.9	871.1	Colo., Ariz., Utah, N. Mex.	57
(10)	(10)	(10)	(10)	(10)	(10)	Oreg.	58
78.7	154.4	149.3	178.3	212.7	433.9	Idaho, Ariz., Mont., Colo.	59
18.6	29.8	27.6	25.2	29.6	33.0	Fla., N.Y., N.J.	60
23.9	29.1	27.3	55.1	86.7	99.8	Calif., Colo., Nev., Utah	61
34.9	48.3	61.3	74.5	89.6	73.9	Colo., Utah, Ark., Idaho	62
162.7	368.1	269.5	309.3	259.8	219.9	Tenn., Mo., N.J., Idaho	63
58.4	127.5	153.5	147.6	128.8	149.8	(x)	64

[10] Companies value of items that cannot be disclosed. [11] Antimony content. [12] Included with "Values, undistributed." [13] Dried equivalent. [14] Represents shipments [illegible] [15] Gross weight. [16] 5 to 35 percent Mn. [17] Content of concentrate. [18] Content of ore and concentrate. [19] Tungsten content.

Source: U.S. Bureau of Mines, Minerals Yearbook; and beginning 1977 for mineral fuels, from U.S. Energy Information Administration, Energy Data Reports.

APPENDIX I

Excerpt From *Final Draft, The Log Export Issue: An Analysis*
(Jan. 6, 1983)

JOINT LEGISLATIVE COMMITTEE ON TRADE AND ECONOMIC DEVELOPMENT
Room H-197, State Capitol
SALEM, OREGON 97310
(503) 378-8811

The following report on log exports from Oregon has been prepared by the Joint Committee on Trade & Economic Development during the 1981-83 interim. The report was mandated by the 1981 Legislature.

This Committee has recognized that timber harvesting is a major Oregon industry and that Oregon's economic future is tied to its growth as an international trader. The Committee sees Oregon's ports and their workforces as a vital and underdeveloped tool for economic recovery & our trading partners as our economic growth partners. The professional business of trading worldwide is a business not yet understood by many Oregonians, but one critical to a prosperous future for this state.

The extensive research done for this report by Committee members and by the Committee's staff leads to conclusions which point to the best direction for Oregon as a state to follow for the maximum benefit of its people and other resources. It is not swayed by emotionalism or reaction to any special interest group. It puts no industry or group above any other. It may, therefore, anger some industries or special interest groups, but as members of the legislature of Oregon these Committee members have clearly put first this state's crucial long term interests. They, and I, sincerely hope that the full membership of the Senate & House will do the same.

Sincerely,

/s/ RICHARD P. BULLOCK
Richard P. Bullock

JOINT LEGISLATIVE COMMITTEE ON TRADE AND ECONOMIC DEVELOPMENT
Room H-197, State Capitol
SALEM, OREGON 97310
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FINAL DRAFT
THE LOG EXPORT ISSUE: AN ANALYSIS

As Prepared For
Joint Legislative Committee On Trade & Economic Development
For The 1981-83 Interim

January 6, 1983
Prepared By: Staff

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THE LOG EXPORT ISSUE: AN ANALYSIS

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THE LOG EXPORT ISSUE: AN ANALYSIS

INTRODUCTION

Prohibiting timber companies that export raw logs off their private lands from bidding on state timber sales was one of the major issues of the 1981 Legislature. Legislation (HB 2902) that would carry out this policy was defeated and a bill (SB 549) that mandated the Joint Legislative Commitee on Trade and Economic Development to study a number of issues relating to log exports passed.

Central to the issue was the concept that the export of unprocessed logs to the foreign market was the equivalent to exporting jobs that would be available had the logs been processed into finished products in Oregon. The State of Oregon codified this concept in 1961 when it prohibited the export of timber off state lands that had not been "primarily processed" in the United States. Twenty years later an attempt was made to extend this concept to logs being exported off privately-owned lands by prohibiting parties who did so from bidding on state timber sales. The idea here was that persons who exported raw logs off privately-owned lands were "substituting" timber from public lands for their domestic marketing needs. A corollary to this was the belief that the increased profits generated by exporting raw logs enabled persons to bid higher prices for the state timber that they intended to "substitute" for private timber sold in the export market. This, in turn, was said to cause higher prices for public timber than would otherwise be the case and was preventing "smaller" mills (or at least those not involved in log exports) from obtaining sufficient logs at an economical price to keep operating. By preventing exporters of logs from private lands from bidding on public timber sales, the logic supporting the above arguments foresaw an increased availability of public timber through decreased bidding competition and a resultant increased supply of logs at lower prices to non-exporting log mills which in turn would generate more jobs for Oregonians.

The mandate of SB 549 to the Trade Committee was to conduct an interim study to "determine whether it is necessary or in the best interest of the State of Oregon to declare those persons . . . which export timber harvested on privately owned lands in log form to foreign markets ineligible to bid for or purchase forest products to be harvested on lands managed by the State Forester". The mandate included a number of subcharges relating to "substitution", bidding practices, and the constitutional problems associated with the issues as follows:

a. Whether logs harvested on state lands are being substituted for logs harvested on private land which could have been primarily processed in the U.S. but are being exported to foreign markets.

b. The social, economic, employment and energy implications of preventing existing or potential substitution, including the cost and practicality of administering log substitution regulations.

c. Whether there are legal or constitutional problems concerning developing state policies on substitution of logs.

d. A review of the export of logs from privately owned lands and their impact on the public interest of the State of Oregon such as jobs and total revenue for the State of Oregon.

e. A review of the policy of the State of Oregon that allows open market bidding for timber managed by the State Forester, to determine whether the public interest is served in providing unrestricted competition, by considering impacts on jobs and total revenue to the state, counties, and school districts.

Because of events early in the interim which called into question the constitutionality of the basic legislation prohibiting log exports off state lands, that issue will be dealt with first. Following that, empirical data based on log mill surveys and state forest sales will be analyzed in order to provide a basis for consideration of the policy questions before the 1983 Legislature.

THE DATA BASE

Following the close of the 1981 Legislative Session, several hearings were held by the Trade Committee at which both opponents and proponents of a log export ban presented testimony. In addition, witnesses from state and federal agencies concerned with timber were heard. A complete listing of the testimony and materials submitted are contained in the appendix.

In an attempt to resolve some of the conflicting claims put forward by interested parties as well as to identify data relevant to the questions in the study mandate, two sources of primary data were developed. The first was a survey questionnaire sent to all log mills in western Oregon. Since the questions in the study mandate dealt with the impact of log exports on state forest bidding and since the five major blocks of state forest land on which timber sales occurred are all located in western Oregon, log mills east of the Cascades were not surveyed.

Most of the mills east of the Cascades purchase timber from federal forests.

The questionnaire (see copy in appendix) was developed with the cooperation of industry representatives and was designed to elicit information regarding operating characteristics, capital investment, and source of timber supply. The questionnaire was reviewed and approved by the Subcommittee on Log Exports before being sent out.

On February 19, 1982, 166 surveys were mailed to mills compiled from the 1981 Annual Lumber Review and Buyers Guide, a publication of the Western Wood Products Association. By June, 139 questionnaires had been returned for an 84 percent response. Of the non-respondents, most had ceased operations and shut down. Only five companies, with Boise Cascade being the largest, refused to cooperate with the survey. Results from the survey were compiled, coded, and entered into the OLIS computer.

The other major source of data involved state timber sales. Sales data from 1,152 timber sales from 1971 to 1981 was compiled, logged, and entered into the OLIS computer. Relevant portions of data from both of these primary sources are referred to in the following text where appropriate.

PART I: THE LEGAL ISSUE

Introduction

Twenty years earlier, in response to many of the same arguments presented to the 1981 Legislature regarding log exports, the 1961 Legislature passed HB 1663, requiring that all timber (except white cedar) sold by the State, or any of its political subdivisions, be primarily processed in this country. This legislation allowed timber from state lands to be exported in log form if a permit was obtained from the State Forestry Department. Conditions for granting the permit were specific and very stringent, requiring the applicant to demonstrate that he could not sell the logs domestically at a profit in relation to the appraised price for the logs. In 20 years under this law, only 12 applications were received. Of these, only four permits were granted, resulting in the export of approximately 1.8 million board feet of timber.

A. Argument Against Log Export Ban

1. The U.S. Constitution

The Attorney General in 1961, Robery Y. Thornton, was consulted regarding the constitutionality of the proposed law and informed the inquiring legislator that the proposed legislation was contrary to Article I, Sec. 8, clause 3, of the Constitution of the United States. This clause provides:

> "The Congress shall have power . . . to regulate commerce with foreign nations and among the several states, and with the Indian Tribes."

Attorney General Thornton concluded that "the proposed statute now under consideration occupies the position of imposing a burden upon foreign commerce and thus encroaches

upon the exclusive power of Congress". AG Opinion No. 5203, April 18, 1961. (See appendix for complete text.) Nonetheless, the Legislature passed HB 1663 and the Governor signed it into law.

Surprisingly enough, no court challenge has ever been made on the law restricting log export off state lands. Even though only 4 permits allowing log exports had been granted in 20 years, the 1981 Legislature deleted this provision of ORS 526.805-.835 (SB 549) and mandated a study of the issue.

At a very early point in the study (December 21, 1981), Representative Ted Bugas submitted a series of questions regarding the log export issue to the Attorney General (See Appendix). The first question dealt with the potential violation of federal or state constitution of the law prohibiting the export of unprocessed logs off state timber lands. The other questions dealt with the substitution issue.

In responding to this query, Attorney General Dave Frohnmayer dealt only with the first question pertaining to existing state law restricting the export of unprocessed logs grown in Oregon on land owned by the State. Attorney General Frohnmayer concluded that the law was "probably unconstitutional" and did not consider the additional questions regarding "no substitution" clauses because "if ORS 528.805 falls, these too would fall with it". (See Appendix for copy of AG opinion OP-5216, dated February 19, 1982.)

The following excerpts from the AG letter-opinion, with cited cases omitted, illustrate the reasoning behind the opinion of unconstitutionality:

> "The state cannot under any circumstances enact a law forbidding export of unprocessed timber generally, or of any product of Oregon, without being in clear violation of the Foreign Commerce Clause of the United States Constitution
>
> . . .

It was clearly established that this power is exclusive and that the states cannot directly regulate interstate and foreign commerce *as such* except to the extent that Congress has granted permission . . . If a state statute is for a legitimate state end such as the enhancement of public health, safety, security, or conservation, and it does not unduly restrict interstate commerce (a balancing test), it is valid . . .

However, this analysis first requires the establishment of a legitimate state interest in the regulation. If such an interest does not exist, the state regulation is invalid, and attempts by states to interfere with interstate commerce for economic reasons are virtually *per se* invalid . . .

In a closely analogous case, a Louisiana statute made it unlawful to export shrimp caught in Louisiana waters without the heads and hulls removed, *i.e.*, "primarily processed". The real purpose, held the court, was to protect Louisiana processors, but even given the stated statutory purpose to satisfy local demands:

> ". . . A state is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the state." *Foster-Fountain Packing Co.* v. *Haydel*, 278 US 1, 10 (1928)

In spite of the cited U.S. Supreme Court case law upholding the supremecy of the Federal Commerce Clause over state attempts to control local economic resources, the Attorney General was reluctant to reach a conclusive opinion pending the outcome of a similar Alaska case now on appeal to the U.S. Court of Appeals for the Ninth Circuit (Case No. 81-2081).

In *South-Central Timber Development, Inc.* v. *LaResche*, 511 F Supp 139 (D Alaska 1981) the district court held that an Alaskan statute requiring primary manufacture in the state of timber sold by the state was an unconstitutional infringement upon interstate and foreign commerce.

After saying the Alaska case would "probably be dispositive of most of the issues raised" in Oregon, the Attorney General went on to say that the only difference between the two was that the Alaskan law required primary manufacture in the state while Oregon permits primary manufacture in other states. "It is only foreign export for primary manufacture that is prohibited" but:

> "This distinction does make a difference, in our opinion . . . if protection of a state's lumber manufacturing industry is not a valid basis for prohibiting export to other states or countries, protection of American lumber manufacturing industry is certainly beyond Oregon's power. It is reserved by the Commerce Clause to the United States."

Attorney General Frohnmayer also addressed the leading U.S. Supreme Court case relied upon in the proponents brief.

> In *Reeves, Inc.* v. *Stake, supra*, 447 US 429, a 5-4 majority of the court upheld the right of the state of South Dakota to sell cement produced by a state-owned plant only to residents, during a period when demand exceeded supply. This policy clearly burdened interstate commerce. As proprietor of a cement manufacturing plant, the state had the right to limit the benefits of the investment of its citizens to those same citizens.
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> The majority emphasized the state's investment in manufacturing facilities, and very pointedly stated: "Cement is not a natural resource, like coal, *timber*, wild game, or minerals". . . . It went on to point out that South Dakota did not seek to limit sales of limestone—necessary to manufacture cement—to South Dakota residents. Nor did South Dakota prohibit resident purchasers of cement from using that cement out of the state, or from immediately reselling to out-of-state purchasers.

The AG concluded his opinion by saying "we have just informed the State Forester that no export permit can be issued under former ORS 526.815 for export of logs cut under a contract predating repeal of that statute. If, as we believe in all probability, ORS 522.805 is unconstitutional, the purchaser is free to export the logs without a permit".

2. The Oregon Constitution

In addition to the Federal Constitution, a potential ban on log exports must also survive a test of the Oregon Constitution. Since approximately 110,000 acres (mostly in the Elliott State Forest) of a total of 735,000 acres of state timber belong to the Common School Fund, Article VIII, Section 2, of the Oregon Constitution must be taken into account. This provision provides as follows:

> "(1) The sources of the Common School Fund are:
>
> "(a) The proceeds of all lands granted to this state *for education purposes* except the lands granted to aid in the establishment of institutions of higher education under the Acts of February 14, 1859(11 Stat 383) and July 2, 1862(12 Stat 503)."
>
> . . .
>
> "(2) *All revenues derived from the sources mentioned in subsection (1) of this section shall become a part of the Common School Fund.* The State Land Board may expend moneys in the Common School Fund to carry out its powers and duties under subsection (2) of section 5 of this Article. Unexpended moneys in the Common School Fund shall be invested as the Legislative Assembly shall provide by law. *Interest derived from the investment of the Common School Fund shall be applied to the support of primary and secondary education as provided under section 4 of this Article.*" (emphasis supplied)

The reference in the above quoted section of the Constitution referring to the "proceeds of all lands granted to the state for educational purposes" pertains to the Act of Congress admitting Oregon into the union, 11 Stat 383 (1859).

That Act provides in part:

> Section 4 . . . *That the following propositions be, and the same are hereby, affected* to the said people of Oregon for their free acceptance or rejection, *which, if accepted, shall be obligatory on the United States and upon the State of Oregon*, to-wit: first, that sections numbered sixteen and thirty-six in every township of public lands in said State, . . . *shall be granted to said state for the use of schools* . . ." (emphasis supplied)

In 1975, responding to a question regarding proposed legislation requiring the State Forester to set aside certain state timber sales for exclusive bidding by small business concerns, Attorney General Lee Johnson said the above quoted provisions of the Oregon Constitution created a trust which requires the state receive full monetary value for the sale, rental or other use of its trust lands. The trust, said the AG:

> ". . . would prohibit the legislature from authorizing the state to sell timber from its Common School Forest Lands for a price per 1,000 board feet less than the prevailing market price. Stated differently, . . . the legislature cannot validly utilize the Common School Forest Lands to subsidize small businesses in the timber industry by allowing small businesses to purchase timber at set-aside sales for a price less than the competitive price achievable in an open market with competitive bidding. (574 OR. AG. Opinion 7170, May 22, 1975)

Attorney General Frohnmayer, in his February 19, 1982 letter-opinion, went beyond the interpretation that the Common School Trust Fund requires that revenues be maximized by saying the legislature cannot tell the State Land Board how to manage these trust lands:

> . . . As applied to constitutional Common School Fund lands, the legislature does *not* have authority to act as owner. The State Land Board has that authority. If applied to those lands, and if so doing would impair the ability of the State Land Board to sell timber on the most advantageous terms, ORS 526.805 and 526.835 would impair the authority of the Land Board to manage. We therefore unequivocally state that these statutes cannot constitutionally be applied to sale of logs from constitutional Common School Fund lands, if the Land Board finds that sale for export would be a proper management decision. (p. 7. OR. AG. opinion, February 19, 1982)

Both these interpretations are relevant to the proposed log export ban. On the one hand, according to former AG Thornton, any diminution of revenues from common school lands would violate the State constitution. As shall be seen in Part III, prohibiting those companies who export logs off their

private lands from bidding on common school timber sales may well result in decreased revenues to the state. On the other hand, according to present AG Frohnmayer, given the constitutional derivation of the State Land Board's authority to manage common school lands, the legislature has no authority to interfere with the Board's management prerogative.

B. Proponents Argument In Favor Of Log Export Ban

1. The U.S. Constitution

The proponents of a log export ban disagree with Attorney General Frohnmayer's interpretation of how the courts would receive such a ban. They say it is "probable" that Oregon's log export policy is constitutional under current Supreme Court caselaw insofar as an interstate commerce challenge is raised. In materials submitted on hearings on HB 2902 (see appendix) they argue that "with respect to the requirement that the state law not interfere with needed federal uniformity, it will be argued that Oregon's policy merely mirrors current (and long-standing) federal policy with respect to logs cut from federally-owned lands." They argue that three recent U.S. Supreme Court cases dealing with facts similar to those at hand have established that the usual rules prohibiting states from discriminating against interstate commerce do not apply when the state is dealing with its own tax dollars or making decisions respecting state owned goods (as opposed to privately-owned goods). In a 1972 case (*American Yearbook Co.* v. *Askew*, 339 F. Supp. 719 (Md Fla. 1972), affd. mem., 409 US 904) the U.S. Supreme Court upheld the validity of a Florida law requiring that the printing needs of the State of Florida be satisfied by using Florida printers. In a 1976 case (*Hughes* v. *Alexandria Scrap Corp.*, 426 US 794) the same Court sustained the validity of a Maryland program aimed at clearing the state's roads of auto hulks, even though out-of-state auto scappers were discriminated against in the program. A 1980 case, *Reeves, Inc.* v. *Stake*, (447 US 429), is similar to the Oregon situation.

In *Reeves*, the State of South Dakota was challenged by a Wyoming concrete distributor. South Dakota, in response to regional cement shortages, built a cement plant in 1919, and it has operated it since then. Since at least 1974, South Dakota has followed a policy of limiting the sales from the plant to South Dakota residents in times of cement shortages. Reeves sued the state when, in 1978, the state refused to sell concrete to the firm, pursuant to its allocation policy. The United States Supreme Court upheld South Dakota's policy of preferring its own residents. The Court characterized South Dakota as a market participant and said:

> The basic distinction drawn from *Alexandria Scrap* [the 1976 case noted above] between States as market participants and States as market regulators makes good sense and sound law. . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.

The Court went on to say:

> Restraint in this area is also counseled by considerations of state sovereignty, the role of each State "as the guardian and trustee for its people", . . ., and "the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

Responding to Reeves' complaint that South Dakota's preference for its own residents was protectionist, the Court commented:

> The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the state was created to serve.

The proponents of a log export ban argue that the parallels between the facts of *Reeves* and the facts relevant to a consideration of the constitutionality of Oregon's log export policy are obvious. First, in both cases the State is placing limitations on the sale of property that is owned by the State. In both

instances, the property is in existence only because of the investment of significant amounts of tax dollars. Lastly, in both instances the legislatures have chosen to limit one important benefit of a program funded from state tax funds to the citizens of the State who supplied those tax dollars.

The proponents of a log export ban recognize that such a ban is a discrimination against foreign commerce under the federal constitution but argue that Oregon's log export policy is fully consistent with the long-standing federal policy that the products of the national forests are to be used to satisfy the nation's domestic needs.

They say the fundamental policy that the national forests were established for the benefit of the citizens of the United States was clearly stated in the Organic Administration Act of 1897 and carried forward even more explicitly in the Sustained Yield Forest Management Act of 1944. That Act recognized that there is a national interest in preserving the economic stability of communities economically dependent on the neighboring national forests. As one expression of that general policy, federal statutes have, since 1897, banned or limited severely the export of logs cut from federal lands.

The proponents say that despite this clear statutory expression of Congressional policy, a concern during the 1960's for this country's balance of payments difficulties led the Executive Department to permit large-scale exporting of logs cut from federally-owned lands. Following extensive legislative hearings on the problems created by this Executive Department policy, Senator Wayne Morse co-sponsored (along with Senator Mark Hatfield and other western senators) the so-called Morse Amendment. The Morse Amendment, approved by the Congress in 1968, limited the volume of logs cut from federal lands that could be exported.

The Morse Amendment was added to a bill that had originated in the House of Representatives. The Conference Committee report on the bill responded to the questions raised

about the possible impact of the log export limitations on this nation's foreign affairs as follows:

> Before the limitation expires, there will be ample opportunity for the Committee on Foreign Affairs to observe its impact on our relations with other nations and for those committees of the Congress more directly concerned with U.S. forest industries to evaluate its effect on the economy of the United States. 1968 U.S. Code Cong & Ad News 3980

When the Morse Amendment expired in 1971, its provisions were extended for a two-year period. When this extension expired in 1973, Congress attached a similar restriction as a rider to the Department of the Interior and Related Agencies Appropriation Act, 1974. Congress has renewed this limitation on log exports off federal lands every year since 1973 and is expected to do so again before the end of this fall session.

From this series of extensions restricting log exports, the proponents of a log export ban argue that Congress has clearly concluded that any foreign affairs impact is of less concern than the adverse impact on community stability caused by a policy of unlimited log exports. Timber cut from lands owned by the State of Oregon constitutes (in 1975) only 2.2% of the total timber harvest in Oregon (as compared to timber cut from federal lands, which constitutes 44.8% (again in 1975) of the total harvest in Oregon). From this, the proponents of a log export ban argue that:

> It seems highly unlikely, given the long-standing federal policy governing log exports of logs cut from federal lands, and given the relatively small portion of the total Oregon timber harvest that comes from lands owned by the State of Oregon, that Congress would disapprove of Oregon's log export policy. Oregon's policy is consistent with federal policy and does not operate to "impair federal uniformity in an area where federal uniformity is essential." Thus, it is probable that the Supreme Court would hold that Oregon's log export policy survives a Foreign Commerce challenge.

2. The Oregon Constitution

The proponents of a log export ban argue that the mandate of Article VIII of the Oregon Constitution is "significantly broader than maximizing the cash income to the Common School Fund" (see Appendix for proponents brief). They quote Section 5(2) which states the basic policy the State Land Board shall follow:

> (2) The board shall manage lands under its jurisdiction with the object of *obtaining the greatest benefit for the people of this state*, consistent with the conservation of this resource under sound techniques of land management. (emphasis added)

The proponents cite the official explanation of the Voter's Pamphlet when Section 5(2) was added to Article VIII in 1968. This language makes it clear that the purpose of this addition was to broaden the State Land Board's management powers:

> . . . *In managing these* (State) *lands, the Board is now restricted to a single objective*—to maximize its cash income. It cannot spend for fencing, seeding or rangeland or improvements of its lands generally, even though such improvements could enhance its income in the long run. The Board normally cannot set aside land for public recreation, parks or scenic purposes.
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> *The proposed amendment will remove this strict cash income objective*, permitting land uses varying with the location, type of land and needs of the citizens of the state. In addition, it will permit the Board to spend monies from the Common School Fund on worthwhile land improvements. . . . May 28, 1968 Voter's Pamphlet at 4 (emphasis added)

The proponents also cite the broad management authority over common school forest lands by the Legislature to the State Forester (ORS 530.490(1) and 530.500) as evidence that these lands are to be managed for the "greatest benefit of the people of this state" rather than for maximizing their cash income.

The proponents further look to the wording of the Oregon Admission Act which granted public lands to the State "for the

use of Schools." They say there is no apparent reason why the above phrase ought to be interpreted to mean "producing the greatest cash income to the Common School Fund." They say if State-owned forest lands are managed so as to protect jobs for local residents, a number of financial benefits to schools are likely to result:

> 1) The person employed in the mills will pay income taxes into the General Fund of Oregon (a significant portion of which is returned to schools in the form of Basic School Support). The mill owners, as well, will be paying income taxes.
>
> Both employees and mill owners will have the income needed to pay property taxes (a large portion of which goes to the support of local schools).

They also say that policies that contribute to the continued economic health of those local mills most likely to bid for logs from State lands in the future will, in the long run, maximize the return to the Common School Fund (on the theory that diminished bidding competition resulting from the bankruptcies of local mills will lead to lower bids in the future.)

For these reasons, the proponents of a log export ban conclude that such a ban would survive a State constitutional challenge.

CONCLUSION

The day after this report was given to the full committee, it was learned that the 9th Circuit Court of Appeals had rendered its decision in *South-Central Timber Development, Inc.* v. *Le Resche*, 511 F Supp 139 (D Alaska 1981). This was the case Attorney General Frohnmayer had said would "probably be dispositive of most of the issues raised" in the Oregon log export issue. Although the Appeals Court decision reversed the District Court's decision, and thus upheld the Alaska law requiring logs off state lands to be primarily processed in Alaska, it probably will *not* be dispositive of the issues raised in Oregon for reasons developed below.

In reversing the District Court, the Appeals Court appears to break new Constitutional ground by saying, "We conclude there is *implicit approval* of the Alaska statute *under congressional statutes which impose similar conditions* on the sale of timber from federal lands" (emphasis added). In developing its novel "implicit congressional approval" doctrine for upholding the state statute, the Appeals Court first paid homage to the Commerce Clause by saying that state statutes which discriminate against interstate commerce for the purpose of local, economic protection are invalid in virtually every case. The Court then said that "despite the force of this rule, there are narrow exceptions, as in the case of a state proprietary activity" and cited the *Reeves* case, depended upon by the proponents of an export ban in the Oregon log export issue and by the State of Alaska in its appeal brief. However, the Court said:

> We need not reach the question, however. This is not a case where the courts must apply the commerce clause absent a declaration by Congress respecting the economic regulation at issue. Here, Congress has acted to validate the state policy.

The Court said that Congress can confer upon the States an ability to restrict the flow of interstate commerce but such express authorization is not always necessary ". . . where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congessional approval, even if the purpose and effect of the state law is to favor local interests."

The Court said "the federal government has consistently endorsed restrictions on the interstate shipment of timber to protect the local processing capability of isolated areas, evincing a general federal policy of promoting geographic dispersion in the timber industry". The Court then traced federal log export restrictions from the Organic Administration Act of 1897 to the "Morse Amendments" of 1973. It concluded the opinion by saying:

> "When Alaska was admitted to statehood in 1959 and received title to a large portion of the territory's public

lands, it contrived to adhere, with limited exceptions, to preexisting federal policy. . . The state's primary manufacture requirements duplicate those imposed on federal timber and serve the same objective, that of promoting industrial developments in isolated areas . . . Its purpose was to protect local processors from the resulting slack in demand for their services caused by the temporary suspension of federal timber sales from national forests in Alaska. The state's decision could not have been more in keeping with federal timber policy. In these circumstances, we find ample congressional acquesence in Alaska's primary manufacture requirements".

Preliminary Analysis:

There are two aspects of this decision which may cause the U.S. Supreme Court to review it (a process which could require another 1-3 years). The first is the "implicit congressional approval" doctrine which has never been enunciated by the U.S. Supreme Court. The Court could as easily find that Congress has repeatedly decided *not* to restrict the export of logs from timber on *non-federal owned lands* as it could the "implicit" extension of the ban off federal lands.

Second, the Appeals Court cast its decision in terms of federal policy "promoting industrial developments in isolated areas" and to "protect the local processing capability of isolated areas, evincing a general federal policy of promoting geographic dispersion in the timber industry". While opinion may differ, Oregon hardly qualifies as an "isolated area" in which it is necessary to promote "geographic dispersion" in the timber industry.

The anti-substitution clauses advocated by the proponents of a log export ban in Oregon penalize companies exporting logs off private lands in foreign commerce. This would appear to make it a very different factual situation from the Alaskan case but, again, predicting how a court will hold on this issue, is akin to studying sheeps' entrails for a sign of the future. The Appeals Court holding appears to reaffirm this observation.

In a letter to the State Forester dated December 14, 1982 (See appendix) Attorney General Frohnmayer stated that given the Ninth Circuit decision "there is no present basis upon which to conclude that the courts would find the Oregon statutes to be invalid". He also said "the [forestry] department therefore *may* but is *not required* to insert a provision in its contracts requiring primary processing in the U.S. or otherwise referring to ORS 526.805 and 526.835". The AG said it would be appropriate for the department to report any known violations of these statutes to the local district attorney. He also reiterated his opinion that the export ban does *not* apply to Common Fund lands.